TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted] 291

HARTFORD LIFE INSURANCE COMPANY, PETITIONER,

vs.

NANNIE M. JOHNSON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PETITION FOR CERTIORARI FILED OCTOBER 15, 1917.
CERTIORARI AND RETURN FILED DECEMBER 10, 1917.

(26,209)

(26,209)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 742.

HARTFORD LIFE INSURANCE COMPANY, PETITIONER,

vs.

NANNIE M. JOHNSON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1918.

a Original.

Certified.

In the Kansas City Court of Appeals, October Term, 1910.

No. 9402.

NANNIE M. JOHNSON, Plaintiff and Respondent,

vs.

HARTFORD LIFE INSURANCE COMPANY, Defendant and Appellant.

Appeal from the Circuit Court of Henry County, Missouri.

ABSTRACT OF RECORD.

Jones, Jones, Hocker & Davis and Wash Adams, Attorneys for Appellant.

Filed Mar. 17, ——. J. D. Allen, Clerk.
Office Supreme Court, U. S. Filed Oct. 15, 1917. James D. Maher, Clerk.

b UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it Remembered, That on the first day of July, 1912, there was filed in the Clerk's office of the Supreme Court of the State of Missouri a transcript of record, record entries, briefs and opinion in the case of Nannie M. Johnson, plaintiff and respondent, vs. Hartford Life Insurance Company, defendant and appellant, upon which said cause was heard by the Kansas City Court of Appeals upon an appeal from a judgment in said cause rendered by the Circuit Court of Henry County, Missouri. That such transcript of record, record entries and briefs were so filed in said Supreme Court of Missouri pursuant to an order of said Kansas City Court of Appeals directing the transfer of the cause thereto under the provisions of the statutes of the State of Missouri in such cases made and provided, which said order is as follows, to wit:

In the Kansas City Court of Appeals, March Term, 1912, June 17, 1912.

9402.

Nannie M. Johnson, Resp.,
vs.
Hartford Life Insurance Co., App.

Now at this day the Court being sufficiently advised of and concerning the premises doth consider and adjudge that on account of one of the judges deeming the decision in conflict with Kouts vs. St. Louis Stock Exchange, 189 Mo. 26, and the following decisions of the St. Louis Court of Appeals (Glardon vs. Supreme Lodge K. of P. 50 Mo. App. 45; Miller vs. Grand Lodge 72 Mo. App. 499; Lavis vs. Grand Lodge A. O. U. W. 112 Mo. App. 1; Bange vs. Supreme Council Legion of Honor 128 Mo. App. 461;) that the case should be transferred to the Supreme Court. It is therefore ordered that said cause be *be* certified to the Supreme Court for final determi-
c nation.

State of Missouri, *sct:*

I, L. F. McCoy, Clerk of the Kansas City Court of Appeals, certify that the foregoing is a full, true and complete transcript of the judgment, of said Kansas City Court of Appeals, entered of record at the March Term thereof, 1912, on the 17th day of June 1912, in the above entitled cause.

Give- under my hand and the seal of said Court, at the City of Kansas, this 28th day of June, 1912.

[SEAL.] (Sgd.) L. F. McCOY, *Clerk.*

Said transcript of record so transferred and filed in said Supreme Court of Missouri is in words and figures following, to-wit:

1 In the Kansas City Court of Appeals, October Term, 1910.

No. 9402.

Nannie M. Johnson, Plaintiff and Respondent,
vs.
Hartford Life Insurance Company, Defendant and Appellant.

Appeal from the Circuit Court of Henry County, Missouri.

Abstract of Record.

This is an action by plaintiff who is named as beneficiary in a policy of life insurance issued by the defendant company to James

T. Johnson, now deceased, who was the husband of plaintiff, to recover $5,000 and interest. The action was begun by petition filed in the Circuit Court of Henry County, State of Missouri, on December 27, 1907. Summons was issued thereon by the clerk of said court, returnable on the second Monday in January, 1908, and duly served.

The petition filed in said cause and on which the case was tried was as follows:

2 *Petition.*

(Caption and Signature Omitted.)

Plaintiff for her cause of action against the defendant states that said defendant is a corporation duly incorporated according to law and at all times herein stated was engaged in the business of life insurance in the State of Missouri.

That at the time the contract or policy of insurance was entered into by defendant as hereinafter stated the corporate name of defendant was The Hartford Life and Annuity Insurance Company; that since said contract was entered into defendant has changed its name and is now doing business under the corporate name of the Hartford Life Insurance Company.

On the first day of November, 1888, the defendant in consideration of the payment by James T. Johnson of a certain sum of money and in consideration of the agreement by the said James T. Johnson to pay it thereafter certain sums of money as the same might become due, executed and delivered to said James T. Johnson a certain contract or policy of insurance whereby it agreed to pay upon the death of said James T. Johnson to his wife, the plaintiff, if living, the sum of five thousand dollars ($5,000), which said policy is numbered 109854 and is herewith filed.

Plaintiff alleges that the said James T. Johnson died on the 15th day of January, 1907; that up to the time of his death the said James T. Johnson had complied with all the conditions, stipulations and requirements in said contract on his part to be performed by him.

3 That in addition to the considerations paid by said James T. Johnson hereinbefore mentioned, the said James T. Johnson at or soon after the execution of said contract deposited with defendant the sum of $50.00, which was received by defendant and placed to the credit of said James T. Johnson, which has ever since been retained and is now retained by defendant, and is now in the custody and under the control of defendant as a deposit. At the time of the death of said James T. Johnson that upon said $50.00 deposit certain interest had accrued, which together with said deposit was in the hands and under the control of said defendant at the time of the death of James T. Johnson for the benefit of said James T. Johnson.

That plaintiff was the wife and is now the widow of said Johnson: that since the death of James T. Johnson she has complied with all

the requirements in said contract required of her; that said defendant, though requested so to do, and though the sum of $5000.00 is due plaintiff from defendant, yet so it is the defendant has hitherto vexatiously failed and refused and doth still vexatiously fail and refuse to pay the same, so that the same is now due plaintiff from defendant and remains unpaid.

Wherefore, plaintiff prays judgment against defendant for said sum of $5,000.00, with interest thereon, together with a penalty of 10 per cent for its vexatious refusal to pay said money, and also for a reasonable attorneys' fee, which plaintiff alleges to be $1,000.00, with interest and for costs.

And thereafter defendant filed its answer to said petition, which is as follows:

4 *Answer.*

(Caption and Signature Omitted.)

Now comes the defendant and

Admits that it is a corporation duly incorporated according to law and at all times herein stated was doing business in the State of Missouri.

Admits that at the time the contract or policy of insurance sued on was issued the defendant's name was the Hartford Life and Annuity Insurance Company, and that since said contract or policy was issued the defendant has changed its name and is named the Hartford Life Insurance Company.

Admits that on the first day of November, 1888, the defendant executed and delivered to James T. Johnson that certain contract or policy of insurance numbered 109854, which is filed with plaintiff's petition, but denies that the consideration for the issue of said policy or contract is as set forth in the plaintiff's petition.

Admits that the defendant, by said contract or policy, for the consideration and upon the conditions therein named, agreed to pay upon the death of James T. Johnson to his wife, the plaintiff, if living, the sum of five thousand dollars ($5,000).

Admits that the said James T. Johnson died on the 15th day of February, 1907.

Admits that up to the time of his death the said James T. Johnson had complied with all the conditions, stipulations and requirements in said contract on his part to be performed by him; except in the particulars hereinafter affirmatively pleaded.

5 Admits that plaintiff was the wife and is now the widow of said James T. Johnson.

Admits that since the death of James T. Johnson the plaintiff has complied with all the requirements in said contract required of her.

Admits that demand has been made on the defendant for the said sum of five thousand dollars ($5,000), and that payment thereof has been refused.

Denies that said sum of five thousand dollars ($5,000) is due from the defendant to the plaintiff and denies that the defendant has vexatiously failed or refused to pay the same.

Admits that at the time of the issuance of said policy or contract and soon after the execution thereof, the said James T. Johnson deposited with the defendant the sum of $50, but denies that the same was received by the defendant and placed to the credit of James T. Johnson and denies that said sum or any part thereof has ever been retained by, or is now retained by, the defendant, or that said sum or any part thereof is in its custody or under its control as a deposit or otherwise.

Denies that upon said deposit of $50 any interest has accrued or that the said deposit or the interest thereon was in the hands of or under the control of the defendant at the time of the death of James T. Johnson for the benefit of James T. Johnson or otherwise.

And, having fully answered, the defendant prays to go hence with its costs.

Further answering the petition, the defendant alleges that on the 27th day of October, 1888, said James T. Johnson made a written and signed application for the policy or certificate sued on
6 herein and that in said application the said James T. Johnson agreed as follows:

"If I or my representatives shall omit or neglect to make any payment as required, in respect of amount, place and time of payment, by the condition of such certificate, then the certificate to be issued hereon shall be null and void, and all money paid thereon shall be forfeited to said company."

The defendant alleges that it received and accepted said application, and on the faith of the agreement therein contained, as above set forth, issued the policy or certificate sued on herein, which expressly refers to and makes said application a part of said certificate or policy; and by the terms of said policy it is expressly provided that it is issued in consideration of the

"Payment of all mortality calls proportioned to the said indemnity, levied against the herein named member to form a mortuary fund for the payment of all indemnity matured by deaths of members, and to create a safety fund as hereinafter described, which mortality calls, to be levied upon all the members in the department wherein this certificate is issued, whose certificates are in force at the dates of such deaths, shall be made according to the table of graduated mortality ratios given hereon, and as further determined by their respective ages and the aggregate indemnity at the dates of such deaths, with due allowance for discontinuance of membership;"

And that the member shall pay $3.00 per annum on each $1,000 of indemnity, either annually or by pro rata installments, in advance; and that "if the laws of any state shall require a tax to be paid by said company on account of such payments, then the mor-
7 tality calls hereon shall be determined so as to cover said tax."

Defendant alleges that it is further provided in said certificate that one-third of the proceeds of such mortality calls shall be applied towards the Safety Fund referred to in said certificate until from such application the sum of ten dollars on each one thousand dollars of indemnity shall have been thus applied, and that there-

after the basis of all subsequent mortality calls shall be two-thirds only of the table endorsed on said certificate or policy.

Defendant alleges that in said policy it is expressly provided that the indemnity agreed to be paid shall be payable out of the Mortuary Fund so as to be created by mortality calls or assessments as above set forth, and not otherwise.

Defendant further alleges that said policy further provides and the said James T. Johnson agrees to pay the defendant within thirty days from the day on which notices bear date, all mortality calls determined as in said policy set forth, and that the proceeds of such mortality calls, less the cost of collection, as in said policy set forth, and less the amount therein provided to be set apart to the Safety Fund, shall constitute the Mortuary Fund of said company.

Defendant alleges that said policy further provides:

"The member further agrees and accepts this certificate upon the express condition that if the * * * mortality calls * * * as hereinbefore required are not paid to the Company on the day due, then this certificate shall be null and void and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force either from said Company or the Trustee of the Safety Fund."

8 Defendant alleges that said policy further provides:

"No mortality call to fall due on the first quarter day following the date of this contract can be made. A notice directed to the address of the member, or other person designated by the member, appearing at the time on the Company's books, shall be a sufficient notice of any required payment, and a certificate of the Secretary, supported by affidavit of the person whose duty it was to perform the service, of such addressing and of mailing of notice in postoffice at Hartford, shall be taken and admitted as conclusive evidence of such addressing and mailing and be admitted as conclusive proof of due notice to each and every person interested herein; but if the person addressed as aforesaid shall fail to receive a notice of mortality call before the 15th day of February, May, August and November in each year, nevertheless this contract shall not discontinue if an amount equal to the amount of the last paid mortality call be transmitted to and received by the Company's Secretary on or before the fifth day of the calendar month next following the month in which the aforesaid failure of notice shall have occurred."

Defendant alleges that on the 2d day of May, 1902, the defendant made and levied against the said James T. Johnson, under said policy, a mortality call or assessment for the sum of seventy-four dollars and fifty-five cents; that said assessment was made according to the table of graduated mortality ratios given on said policy and was for two-thirds of the amount shown by said table at the age of said member, plus 2, the amount of the tax required to be paid, and paid, to the State of Missouri, and said assessment being for the period of three months and the annual dues not having been paid in advance, there was added thereto the sum of $3.75, being the pro rata

9 installment of dues for the period of three months; that said assessment was levied upon all of the members in the department wherein said certificate was issued, whose certificates were in force on said date, which assessments were likewise made according to said table of graduated mortality ratios as determined by their respective ages of said members and the aggregate indemnity at the dates of the deaths for which said assessment was levied, with due allowance for discontinuance of membership, and to create and form a Mortuary Fund for the payment of all indemnity matured by deaths.

Defendant alleges that notice of said assessment was duly given to the said James T. Johnson; that the same was dated the 2d day of May, 1902, and was deposited in the postoffice at Hartford on said date, directed to the address of said James T. Johnson as it appeared on the books of the defendant at that time; that notice of said assessment or mortality call was duly received by said James T. Johnson, but that he failed to pay the same within thirty days from the day on which said notice bore date, that is to say, on or before June 1, 1902; that the defendant extended the time for the payment of said assessment until June 20, 1902, and afterwards, on June 19, 1902, the said James T. Johnson applied for a further extension of the time in which to pay said assessment or mortality call, and, thereupon, the defendant again extended the time for the payment of said mortality call or assessment until July 5, 1902.

Defendant further alleges that the said James T. Johnson failed and neglected to pay the said mortality call either on or be-
10 fore June 1, 1902, the date when the same was due and payable, or on or before June 20, 1902, or on or before July 5, 1902, the dates to which the payment thereof had been successively extended, or at any other time, and that by the terms and provisions of said policy and application, the failure of said James T. Johnson to pay said mortaiity call or assessment, ipso facto, terminated said certificate or policy.

Defendant alleges that although the said James T. Johnson lived until the 15th day of January, 1907, or for nearly five years after the forfeiture of said policy, by reason of the non-payment of said assessment in July, 1902, he at no time considered said certificate or policy as in force, but at all times acquiesced in the forfeiture thereof, resulting from the non-payment of said mortality call or assessment.

And having fully answered, defendant prays to go hence with its costs.

Defendant further alleges that said policy further provides as follows:

"That said Company will deposit said sum of ten dollars, when received, with the Trustee named in a contract made with it (of which a copy is printed hereon) as a Safety Fund in trust for the uses and purposes expressed in said contract; and shall make a semi-annual division of the net interest received therefrom by it, pro rata among all the holders of certificates in force in said department at such times, who shall have contributed five years prior to the date

of any such division their stipulated proportion of said fund, by applying the same to the payment of their future dues and assessments; and that, whenever said fund shall amount to one million dollars, all subsequent receipts therefor shall be divided by the said Company in like manner as the interest. Said Company
11 further agrees that if at any time it shall fail by reason of insufficient membership, or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any certificate issued in said department, and such certificate shall be presented for payment to said Trustee by the legal holder thereof, accompanied by satisfactory evidence, as hereinafter provided, of its failure to pay, after demand upon it within the time herein stipulated for limitation of action, then it shall be the duty of said Trustee to at once convert said Safety Fund into money and divide the same (less the reasonable charges and expenses for the management and control of said fund) among the holders of certificates then in force in said department, or their legal representatives, in the proportion which the amount of each of their certificates shall bear to the amount of the whole number of such certificates in force; and that in such event it shall file with said Trustee a correct list, under oath, of the names, residences and amounts of the certificates of all members entitled to participate in such division. The evidence referred to above to be either certification of said Insurance Company's President or Secretary that a claim is justly and legally due and that payment thereof has been demanded and refused, or the duly attested copy of a final judgment obtained thereupon in any court of competent jurisdiction, satisfaction of which has been neglected or refused for the period of sixty days from its date.

"And said Company further agrees that so long as any certificate of membership in its Safety Fund Department shall remain in force, said fund shall be in no wise chargeable or liable for any use or purpose except as above mentioned."

And a copy of the contract with the Trustee so referred to in said policy is set forth at length on the third page of the policy or certificate sued on.

12 Defendant further alleges that by the application of one-third of the first assessments or mortality calls paid by the said James T. Johnson, the sum of ten dollars per thousand, or a gross sum of fifty dollars (said policy being for \$5,000) was set aside and by the defendant paid over to the Trustee referred to in said Trustee's contract; that the said fund so deposited with the Trust Company has ever since remained in the possession and control of said Trustee and that the defendant has no possession or control thereof and never has had.

And having fully answered, defendant prays to go hence with its costs.

And thereafter plaintiff filed her reply to said answer, which is as follows:

Reply.

(Caption and Signatures Omitted.)

For reply plaintiff denies each allegation of new matter contained in answer.

Trial.

On May 12, 1909, the same being the seventh day of the regular May Term of the Circuit Court of Henry County, Missouri, the cause came on for trial before the Court, Honorable C. A. Denton, Judge, and a jury, resulting in a verdict and judgment in favor of plaintiff in the sum of five thousand five hundred and fifty-six dollars and sixty-six cents ($5,556.66) and against the defendant.

13 *Motion for New Trial.*

On May 13, 1909, during the said May Term, 1909, of said court, and within four days after the rendition of the verdict, the defendant filed its motion for a new trial.

On September 13, 1909, a day of the September Term, 1909, of said court, to which said motion for new trial had been continued, the said motion for new trial was overruled by the Court and final judgment rendered on the verdict, to which action of the Court, in overruling said motion for new trial, the defendant duly excepted.

On said September 13, 1909, and during said September Term, 1909, of court, during which said motion for new trial was overruled, the Court, by its order, duly made and entered of record, gave the defendant leave to file its bill of exceptions until and including the second day of the next term of said court, to-wit, the 11th day of January, 1910.

Appeal.

On said September 13, 1909, defendant filed its affidavit for appeal, which is in words and figures as follows:

14 *Affidavit for Appeal.*

"STATE OF MISSOURI,
County of Henry, ss:

In the Circuit Court, September Term, 1909

NANNIE M. JOHNSON, Plaintiff,

vs.

HARTFORD LIFE INSURANCE COMPANY, Defendant.

Affidavit for Appeal.

STATE OF MISSOURI,
County of Henry, ss:

C. C. Dickinson, Attorney and Agent for the above-named defendant, Hartford Life Insurance Company, being duly sworn, makes oath and says that the appeal prayed for in the above entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the Court.

C. C. DICKINSON.

Subscribed and sworn to before me this 13th day of September, 1909.

R. L. COVINGTON,
By S. L. GRINSTEAD, *D. C.*"

On said September 13, 1909, the Court allowed the defendant an appeal to the Kansas City Court of Appeals at Kansas City, Missouri, and gave the defendant leave to file its appeal bond in the sum of eleven thousand five hundred ($11,500.00) dollars within 10 days after the adjournment of the September Term, 1909, of said court, and at the same time defendant deposited with the Clerk of said Circuit Court the $10 docket fee as required by law.

15 And afterwards, on September 20, 1909, and within the ten days allowed by the Court within which to file its appeal bond, the defendant presented its appeal bond to the Court, which was duly approved and ordered filed by the Court and filed by the clerk of said court.

And afterwards, on the 7th day of October, 1909, within due time, defendant filed in the office of the Clerk of the Kansas City Court of Appeals a certified copy of the order and judgment appealed from and the order granting the appeal to said Kansas City Court of Appeals.

And afterwards, and within the time for filing the bill of exceptions heretofore granted, and for good cause shown, and by con-

sent of the parties, the time for filing the bill of exceptions was extended by order of Court, duly made and entered, to and during the May Term, 1910, of said court.

And afterwards, on the 2nd day of May, 1910, the same being the first day of the May Term, 1910, of the Circuit Court of Henry County, and within the time allowed the defendant to file its bill of exceptions, defendant presented its bill of exception, which was on said day by the Court allowed, signed, sealed and ordered filed and made a part of the record in this cause, and said bill of exceptions was thereupon duly filed by the clerk and made a part of the record in this cause.

Said bill of exceptions recites as follows:

16 *Bill of Exceptions.*

In the Circuit Court of Henry County, Missouri, May Term, A. D. 1909.

NANNIE M. JOHNSON, Plaintiff,

vs.

THE HARTFORD LIFE INSURANCE COMPANY, Defendant.

Be it remembered, That on Wednesday, May 12, 1909, the same being the seventh day of the regular May Term of said court, the above-entitled cause coming on to be heard, the following proceedings were had and made of record therein, to-wit:

Plaintiff, to sustain the issues upon her part, offered the following testimony:

By Mr. Fyke: We offer the policy in evidence on file in this court, marked Exhibit "A."

(Said policy is also Exhibit 2 to the deposition of George E. Keeney and is hereinafter set out in full on page 77 of this abstract.)

Mr. C. A. CALVIRD, of lawful age, being produced, sworn and examined, testified on behalf of plaintiff as follows:

Examined by Mr. M. A. Fyke:

Q. Your name is C. A. Calvird?
A. Yes, sir.
Q. What is your business?
A. Lawyer.
Q. How long have you been practicing law in Clinton?
A. Oh, I have been in active practice here about twenty-five years.

17 Q. Are you familiar with the usual and reasonable charges of attorneys, the reasonable attorney's fees in cases pending in this court?
A. Why, I think so; reasonably so.

Q. Mr. Calvird, here is a case of a policy of life insurance, in which the amount claimed is five thousand dollars, and which is being defended; the defendant served notice on plaintiff to take deposit-on in Hartford, Connecticut, and depositions were taken there, I believe consuming something like three days, the taking of which depositions, I believe constituted all the testimony, or practically all on the part of defendant—I will ask you to state to the jury, if you please, what, in your judgment would be a fair, reasonable attorney's fee for the prosecution of this suit, taking into consideration the services that I have rendered, and an attorney went from Clinton to Hartford to cross-examine the defendant's witnesses produced there and did so cross-examine them?

By Mr. James C. Jones: Defendant objects, because the matter inquired about isn't within the issues of this case; it isn't a matter for ascertainment or assessment by the same jury that tries the main issues, because the law on which the claim is founded for attorney's fees is unconstitutional, and because there is no proof and cannot be any proof in this case of the condition upon which attorneys' fees can be imposed, to-wit, that the litigation is vexatious; no proof of that fact that the litigation is in any sense vexatious.

By the Court: You mean, there is no proof at this time?

By Mr. Jones: Yes; there is no proof and cannot be any proof that the litigation is vexatious.

18 By the Court: Up to this time, of course, there hasn't been; as to whether there will be or not—objection overruled.

To which ruling of the Court the defendant then and there excepted and now excepts.

Q. You understand the question?

A. Taking into consideration the facts as stated, as conceded by the attorneys in the case, in a case of this kind, the ability and skill necessary to properly prosecute it; I think a thousand dollars would be a reasonable fee.

Witness excused.

By Mr. M. A. Fyke: We offer in evidence annual statement of Hartford Life Insurance Co., of Hartford, Conn., to the Insurance Department of the State of Missouri, of the condition of its business, ending December 31st, 1900. We do not desire to read all this statement, nor offer it all, but only such part of it as we think pertinent to the issues in this case.

By Mr. Jas. C. Jones: We interpose the objection that it is irrelevant, immaterial and incompetent, as evidence in the case.

By Mr. Fyke (reading from report): First: "Premiums in course of collection, Safety Fund Department, $349,000." Under the head of "Other Liabilities" offer this: "Net Safety Funds in Security Co., $1,112,569.14; Reserve on Safety Fund Policies, $265,104; less deferred premiums, $34,838, leaving $230,220."

By Mr. Jones: We object to that for the reason that it doesn't appear that any of these funds are funds concerned in the matter of controversy, or related in any manner to these contracts, and because whatever was in the safety fund could not in any wise affect the defendant's right to demand this assessment pleaded in the
19 answer; and the same refers to the premium in course of collection; because the policy in this case was made for the purpose of creating, maintaining and recreating a mortuary fund, within the limitation stated in the policy; for the reason that it is not alleged in the petition nor the reply in this case that the company had any reserve for premiums in course of collection, or mortuary fund, or that any such funds or the funds in the safety fund account with the Trustee precluded the defendant from making the assessment; and the proof offered is not confined to the issues made by the pleadings, nor has the defendant had any notice by the pleadings that such proof would be offered. And because the report from which the figures are offered is a statement of the affairs of the company made to the Insurance Department of the State of Missouri, and the matters inquired about are not required to be set forth by law, and it is not shown that the statement is made within the knowledge—within the duties of the officer or agent who made them to the Insurance Department of Missouri.

By the Court: That is a report made to the State Department of Missouri.

By Mr. Fyke: Yes, sir; certified copy; that is, under oath.

By Mr. Jones: I make no objection to it on the ground that it is only a copy.

By the Court: That being an official statement made to the Department of State, I will overrule the objection; but I confess as to the other parts of the objection I am not sufficiently informed now to rule intelligibly. I will overrule the objection, it being an official document.

To which ruling of the Court the defendant then and there excepted and now excepts.

20 Said report for the year ending December 31, 1900, was in words and figures as follows:

"Hartford Life Insurance Company.

(Commenced Business 1867.)

George E. Keeney, President. Charles H. Bacall, Secretary.

I. Capital.

Capital stock paid up in cash	$500,000.00		
Amount of net ledger assets December 31, 1899		$2,718,271.00	
Increase of capital during 1900		250,000.00	
Extended at			$2,968,271.00

II. Income During Year.

First year's premiums less interest included in deferred premiums, $1,555; and $1,549.41 for first year's reinsurance	$309,437.20		
Renewal premiums, less interest included in deferred premiums, $155.60 and $153.96 for renewal reinsurance premiums	1,890,608.62		
Dividends applied by policy holders to pay running premiums	414.04		
Total premium income		$2,200,459.86	
Rents from company's property, including $3,500.00 for company's use of own buildings	$13,519.09		
Interest on loans on mortgages of real estate	11,934.73		
Interest on collateral loans, including premium notes, loans or liens	4,914.21		
Interest on bonds and dividends on stocks	21,969.31		

Interest on other debts due the company, and on deposits in banks	50,238.49		
Interest on deferred premiums	1,710.60		
Total rents and interest		104,286.43	
Profits on sales of real estate, $15.20; on sale or maturity of securities, $406.25		421.45	
From other sources, viz: Partial increase in book value of real estate as shown by appraisal Missouri and Conn. departments, $12,221.88; advanced payments, $6,644.85; safety fund deposits, $20,170.86		39,037.59	
Total income during the year			$2,344,205.33
Sum of both amounts			$5,312,476.33

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III. Disbursements During the Year.

For death claims	$1,659,649.88	
Deduct amount received from other companies for claims on policies of this company reinsured	7,043.00	
Total net amount actually paid for losses		$1,652,606.88
Advance payments used		6,548.49
Dividends paid policyholders		9,010.67
Dividends applied by policyholders to pay running premiums		50,468.12
Surrender values paid		3,135.00
Total paid policyholders		$1,721,769.16

Paid stockholders for interest or dividends amount declared during the year	30,000.00	
Commissions and bonuses to agents (less commission received on reinsurance), new policies, $216,570.97; renewal policies, $37,365.12	253,936.09	
Salaries and allowances for agencies, including managers, agents and clerks	66,633.70	
Salaries and all other compensation (officers, $33,440.08; Home Office employes, $48,993.77)	82,433.85	
Medical examiners' fees, $33,262.10; inspection of risks, $1,010.77	37,272.87	
Taxes on new premiums, $388.91; renewal premiums, $16,600.87; on franchise, $415; on reserves, $608.20; municipal licenses, $230.81; internal revenue, $11,183.06	29,426.85	
Taxes on real estate	3,681.00	
Insurance Department fees and agents' licenses	5,119.50	
Repairs and expenses (other than taxes) on real estate	1,491.56	
Rent (including $3,500.00 for company's use of own buildings)	14,233.55	
Advertising, $8,347.84; printing and stationery, $15,935.21; postage, $8,989.40	33,272.45	
Legal expenses, $4,984.65; for furniture, etc., $13,268.96; traveling, $4,855.68	23,109.29	
Losses on sales of real estate	6,044.51	
All other items, viz: Paid stockholders' dividend from stockholders' surplus repaid by them to increase capital stock	250,000.00	
Total disbursements		$2,558,424.38
Balance		$2,754,051.95

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IV. Ledger Assets.

Book value real estate, unincumbered	$261,101.93	
Mortgage loans on real estate, first liens	298,320.00	

Loans secured by pledge of bonds, stocks, or other collateral	700.00	
Loans made to policyholders on this company's policies assigned as collateral	53,931.00	
Premium notes on policies in force, for first year's premiums	50,173.93	
Book value bonds, excluding interest, \$304,597.22; stocks, \$167,344.45	471,941.67	
Cash in company's office, \$8,778.49; deposited in bank, \$414,575.79	423,354.28	
Safety fund in Security Company, Hartford	1,194,529.14	
Bills receivable	1,000.00	
Total	\$2,755,051.95	

Ledger Liabilities.

Agents' credit balances	\$1,000.00	
Total net ledger assets, as per balance above		\$2,754,051.95

Non-ledger Assets.

Interest accrued on mortgages	\$4,548.92	
Interest accrued on bonds and stocks	6,474.18	
Interest accrued on collateral loans	1,562.94	
Interest accrued on premium notes, loans, or liens	325.50	
Interest accrued on other assets	2,066.06	
Rents accrued on company's property or lease	1,142.90	
Total interest and rents		16,120.50
Market value of real estate over book value		10,903.07
Market value of bonds and stocks over book value		15,936.26

	New business.	Renewals.	
Gross premiums, not more than three months due after period of grace unreported on policies outstanding December 31	....	$19,074.08	
Gross deferred by premiums on policies outstanding December 31	$74,807.47	15,862.73	
Totals	$74,807.47	$34,936.81	
Deduct cost of collection, 60 per cent on "new"; 6 per cent on "renewals"	44,884.48	2,096.21	
Net amount of uncollected and deferred premiums			62,763.59
Other items, premiums in course of collection, safety fund department			349,000.00
Gross assets			$3,208,775.37

Assets Not Admitted.

Bills receivable, unsecured	$1,000.00	
Premiums notes or loans and net premiums in excess of reserve on policies	247.00	
Depreciation in ledger assets to bring same to market value; safety funds	81,960.00	
Total		83,207.00
Total admitted assets		$3,125,568.37

23 V. Non-ledger Liabilities.

Net present value of all the outstanding policies in force on the 31st day of December, 1900, according to the Actuaries' Table of Mortality, with four per cent interest, stock department	$354,737.00	
Same for reversionary additions	3,294.00	
Total	$358,031.00	
Deduct net value of risks of this company reinsured	3,654.00	
Net reinsurance reserve		$354,377.00
Death losses in process of adjustment or adjusted and not due, safety fund department, $393,750.00; stock department, $22,900.00	$416,650.00	
Death losses which have been reported and no proofs received, stock department	6,000.00	
Death losses and other policy claims resisted by the company, safety fund department	6,000.00	
Net policy claims		428,650.00
Unpaid dividends or other profits due policyholders		2,255.65
Salaries, rents, expenses, taxes, bills, accounts, bonuses, commissions, medical and legal fees, etc., due or accrued		2,861.50
Premiums paid in advance		2,953.01
Any other liability of the company, viz:		
Net safety funds in Security Company of Hartford, Conn.		1,112,569.14

Reserve on safety fund policies		230,220.00
Mortuary fund held in addition to reserve		111,495.36
Liabilities on policyholders' accounts		2,245,381.66
Gross divisible surplus	$380,186.71	
Capital stock paid up	500,000.00	888,186.71
Total		$3,125,568.37

24 VI. Exhibit of Policies—"Ordinary."

	Business of the year.		Aggregate.	
	No.	Amount.	No.	Amount.
Outstanding at end of year 1899, as reported	39,883	$79,448,430		
Deduct unpaid of 1899	246	505,200		
Amount in force, actually paid for at end of previous year			39,637	$78,943,230
New policies issued	70,615	$11,717,951		
Old policies revived	21	46,800		
Total new business			7,886	11,764,751
Aggregate			47,523	$90,707,981

Deduct policies ceased to be in force:				
By death	696	$1,718,974		
By expiry	1	1,000		
By surrender	8	4,929		
By lapse	4,775	9,633,075		
By decrease	840	1,650,900		
Total terminated			6,320	12,523,878
Net numbers and amounts in force at the end of the year			41,203	$78,184,103
Policies reinsured				49,229

VII. Business in Missouri —"Ordinary."

Policies in force December 31, last year	2,859	$6,110,250
Policies issued this year	165	326,300
Total	3,024	$6,436,550
Policies terminated this year	349	683,000
Policies in force December 31, this year	2,675	$5,753,550
Losses and claims on Missouri business, unpaid December 31, last year	11	24,500
Losses and claims on Missouri business incurred this year	44	101,000
Total	55	$125,500
Settled during the year	44	98,500
Losses and claims outstanding December 31, this year	11	$27,000

Premiums collected in Missouri during the year, with no deductions:

In cash	$153,038.33	
Total		$153,038.33

25 VI. Exhibit of Policies—"Industrial."

	Business of the year.		Aggregate.	
	No.	Amount.	No.	Amount.
New policies issued	17,595	$3,094,855		
Terminated	7,272	1,336,329		
Total new business in force end of year			10,323	$1,758,526
Deduct policies ceased to be in force:				
By death	62	12,001		
By lapse	7,210	1,324,328		
Total terminated			7,272	1,336,329

VII. Business in Missouri—"Industrial."

Policies issued this year	898	$164,692
Cancelled during year	231	52,760
Policies in force December 31, this year	667	$101,932
Losses and claims on Missouri business incurred this year	4	$796

Settled during the year	3	296
Losses and claims outstanding December 31, this year	1	$500

1. Total amount of insurance written during 1900 in Missouri and elsewhere on which no part of the premium was reported as paid to the company December 31, 1900:

In Missouri	$119,000.00
Elsewhere	1,090,000.00

2. Total amount of insurance outstanding in Missouri and elsewhere on which no part of the premium was reported as paid to the company December 31, 1900:

In Missouri	None.
Elsewhere	None.

3. Amount held as reserve or otherwise to date of statement for the payment of dividends to holders of deferred dividend policies in force December 31, 1900 .... None."

By Mr. Fyke: Now, we offer the report of this defendant, the Hartford Life Insurance Company, to the Superintendent of Insurance of the State of Missouri, as to the condition of its business at the close of business December 31, 1901. No. 439 is the first item offered.

26 By Mr. Jones: We interpose the objection that it is irrelevant, immaterial and incompetent, as evidence in the case.

We object to that for the reason that it does not appear that any of these funds are funds concerned in the matter of controversy, or related in any manner to these contracts, and because whatever was in the safety fund could not in any wise affect the defendant's right to demand this assessment pleaded in the answer; and the same refers to the premium in course of collection; because the policy in this case was made for the purpose of creating, maintaining and recreating a mortuary fund, within the limitation stated in the policy: For the reason that it is not alleged in the petition, nor the reply, in this case that the Company had any reserve for premiums in course of collection, or mortuary fund, or that any such funds or the funds in the safety fund account with the Trustee precluded the defendant from making the assessment; and the proof offered is not confined to the issues made by the pleadings, nor has the defendant had any notice by the pleadings that such proof would be offered. And because the report from which the figures are offered is a statement of the affairs of the Company made to the Insurance Department of the State of Missouri, and the matters inquired about are not required to be set forth by law, and it is not shown that the statement is made within the knowledge—within the duties of the officer or agent who made them to the Insurance Department of Missouri.

By the Court: Objection overruled.

To which ruling of the Court the defendant then and there excepted and now excepts.

27 Said report for the year ending December 31, 1901, was in words and figures as follows:

"The Hartford Life Insurance Company,

Hartford, Conn.

(Commenced Business April, 1867.)

George E. Keeney, President. Charles H. Bacall, Secretary.

I. Capital.

Capital stock paid up in cash		$500,000.00	
Amount of net ledger assets, December 31st, of previous year			$2,754,051.95

II. Income During Year.

First year's premiums, less interest included in deferred premiums, 1,401	$278,810.03		
Renewal premiums, less interest included in deferred premiums, $1,111.40 and $98,840 for renewal re-insurance	1,991,737.19		
Dividends applied by policy holders to pay renewal premiums	68,186.74		
Total premium income		$2,338,733.96	
Rents from company's property, including $1,500 for company's use of own buildings	$10,181.25		
Interest on loans on mortgages of real estate	13,243.34		
Interest on collateral loans, including premium notes, loans or liens	2,634.07		

Interest on bonds and dividends on stocks	19,391.18		
Interest on other debts due the company, and on deposits in banks	58,922.77		
Interest on deferred premiums	2,512.40		
Total rents and interest		$106,885.01	
Profits on sale of real estate, $1,679.95; on sale or maturity of securities, $30,714.74		32,394.69	
From other sources, viz:			
Advance payments		9,253.97	
Safety fund deposits		17,433.64	
Total income during year			2,504,701.27
Total			$5,258,753.22

28 III. Disbursements During Year.

Total net amount actually paid for losses	$1,763,614.47
Advance payments applied	8,199.34
Premium notes voided by lapse	20,609.17
Dividends paid policyholders and dividends applied by policyholders to pay running premiums	68,186.74
Surrender values paid, less $2,230 received on surrendered reinsurance	120,047.00
Total paid policyholders	$1,980,656.72

Paid stockholders for dividends, amount declared during the year	40,000.00	
Commissions and bonuses to agents (less commission received on reinsurance), new policies, $166,356.34; renewal policies, $46,015.63; industrial, $74,420.78	286,792.75	
Salaries and allowances for agencies, including managers, agents and clerks	14,515.51	
Salaries and all other compensation (officers, $34,833.48; Home Office employes, $55,886.19)	90,719.67	
Medical examiners' fees, $30,350.38; inspection of risks, $7,421.51	37,771.89	
Taxes on new premiums, $604.63; renewal premiums, $22,140.25; on franchise, $265.17; on reserves, $749.94; internal revenue, $3,876.84	27,636.83	
Taxes on real estate	3,448.78	
Insurance department fees and agents' licenses	4,629.68	
Repairs and expenses (other than taxes) on real estate	647.96	
Rent (including $1,500 for company's use of own buildings)	10,491.41	
Advertising, $6,996.83; printing and stationery, $11,007.15; postage, $9,522.96	27,526.94	
Legal expenses, $14,361.65; for furniture, etc., $11,532.66; travel, $10,336.18	36,230.49	
Losses on sale of real estate, $10,244.53; on sale or maturity of securities, $56.25	10,300.78	
Total disbursements		2,571,369.41
Balance		$2,687,383.81

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IV. Ledger Assets.

Book value real estate, unincumbered	$244,345.49
Mortgage loans on real estate, first liens	285,400.00
Loans secured by pledge of bonds, stocks or other collateral	7,800.00

Loans made to policyholders on this company's policies assigned as collateral	10,636.00	
Premium notes on policies in force, $3,795.92 is for first year's premiums	41,795.92	
Book value bonds, excluding interest, $337,476.97; stocks, $79,540.95	417,017.92	
Cash in company's office, $13,816.63; deposited in bank, $465,934	479,750.63	
Safety funds in security company, Hartford	1,201,236.00	
Bills receivable	1,000.00	
Total	$2,688,981.96	
Deduct Ledger Liabilities:		
Agents' credit balances	1,598.15	
Total net ledger assets, as per balance above		$2,687,383.81

Non-ledger Assets.

Interest accrued on mortgages	$4,153.33	
Interest accrued on bonds and stocks	6,195.42	
Interest accrued on collateral loans	78.00	
Interest accrued on premium notes, loans or liens	200.00	
Interest accrued on other assets	1,063.83	
Rents accrued on company's property or lease	633.11	
Total interest and rents		12,323.69
Market value of real estate over book value		9,519.51
Market value of bonds and stocks over book value		7,231.08

A large amount of paid-up insurance which was issued by the company from 1867 to 1880 was retired during the year 1901 by the payment of the full legal reserve as a cash surrender, which accounts for the excess of the disbursements over income.

	New business.	Renewals.	
Gross premiums, not more than three months due after period of grace unreported on policies outstanding December 31	$43,854.26	$31,723.13	
Gross deferred by premiums on policies outstanding December 31st	40,398.52	46,336.16	
Totals	$84,252.78	$78,059.29	
Deduct cost of collection 60 per cent on "new" 6 per cent on "renewals"	50,551.66	4,683.55	
Net amount of uncollected and deferred premiums	$33,701.12	$73,375.74	107,076.86
Other items, premiums in course of collection, safety fund department			358,300.00
Gross assets			$3,181,834.95

Assets Not Admitted.

Bills receivable, unsecured	$1,000.00	
Premium notes on loans and net premiums in excess of reserve on policies.	175.00	
Depreciation in ledger assets to bring same to market value:		
Safety funds	34,330.98	
Total		35,505.98
Total admitted assets		$3,146,328.97

V. Non-ledger Liabilities.

Net present value of all the outstanding policies in force on the 31st day of December, 1901, according to the Actuaries' Table of Mortality, with four per cent interest		$320,610.00	
Same for reversionary additions		3,463.00	
Total		$324,073.00	
Deduct net value of risks of this company reinsured		2,714.00	
Net reserve			$321,359.00
Death losses in process of adjustment or adjusted and not due	$20,480.00		
S. F. steok	222,250.00		
		$242,730.00	
Death losses which have been reported and no proofs received	$8,766.00		
F. F. stock	106,500.00		
		115,266.00	
Death losses and other policy claims resisted by the company	$6,500.00		
S. F. stock	8,000.00		
		14,500.00	
Net policy claims			372,496.00
Unpaid dividends or other profits due policyholders			1,701.40

Salaries, rents, expenses, taxes, bills, accounts, bonuses, commissions, medical and legal fees, etc., due or accrued	2,875.00
Premiums paid in advance	2,266.29
Any other liability of company, viz:	
Net safety funds in security company	1,166,905.02
Reserve on safety fund policies	262,257.00
Mortuary and other funds in addition to reserve	116,313.59
Liabilities on policyholders' accounts	$2,246,173.30
Gross divisible surplus	400,155.67
Capital stock paid up	500,000.00
Total	$3,146,328.97

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VI. Exhibit of Policies—Ordinary.

	Business of the year.		Aggregate.	
	No.	Amount.	No.	Amount.
Policies and additions at the end of previous year			41,203	$78,184,103
New policies issued	8,132	$11,825,128		
Old policies revived	403	875,100		
Total new business			8,535	12,700,228
Aggregate			49,738	$90,884,331

Deduct policies ceased to be in force:				
By death	810	$1,709,994		
By surrender	131	201,400		
By lapse	6,301	11,097,450		
By change and decrease	28	353,100		
Not taken	872	1,438,392		
Total terminated			8,142	14,800,336
Net numbers and amounts in force at the end of the year			41,596	$76,083,995
Policies reinsured			9	56,729

VII. Business in Missouri.

Policies in force December 31, last year	2,675	$51,753,550
Policies issued this year	547	1,193,300
Total	3,222	$6,946,850
Policies terminated this year	568	1,178,800
Policies in force December 31 this year	2,654	$5,768,050
Losses and claims on Missouri business unpaid December 31 last year	11	27,000
Losses and claims on Missouri business incurred this year	48	130,500
Total	59	$157,500

Settled during the year	57	151,000
Losses and claims outstanding December 31, this year	2	6,500
Premiums collected during the year, with no deductions		$187,757.84

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Industrial Insurance in 1901.

Classification.	Total. No.	Total. Amount.
Policies in force end of previous year	10,323	$1,758,226
Policies issued and revived	14,739	1,992,731
Totals	25,062	$3,750,957
Deduct ceased—By death	159	28,255
By lapse	13,968	2,159,959
Totals	14,127	$2,188,214
In force end of year	10,935	$1,562,743

Industrial Business of 1901 in State of Missouri.

Insurance.	No.	Amount.
In force end of previous year	667	$115,186
Policies issued and revived	1,763	242,647
Totals	2,430	$357,833

Deduct ceased	1,289	197,657
In force end of year	1,141	$160,176
Claims by Death:		
Unpaid end of previous year	1	$500
Incurred during year	9	1,027
Totals	10	$1,527
Settled during year	10	$1,527
Premiums collected in Missouri during year		$5,377.70"

By Mr. Fyke (reading from report): Page 440, first item introduced: Premiums in course of collection, Safety Fund Department, $358,300; net Safety Funds in Security Company, $1,166,905.02; reserve on Safety Fund policies, $262,257.00; Mortuary and other funds in additional reserve, $216,313.59.

By Mr. M. A. Fyke: Now, we offer report of Defendant to the Insurance Department of this State, showing the condition of its business on the 31st day of December, 1902.

By Mr. Jones: We interpose the objection that it is ir-
33 relevant, immaterial and incompetent, as evidence in the case.

We object to that for the reason that it doesn't appear that any of these funds are funds concerned in the matter of controversy, or related in any manner to these contracts, and because whatever was in the Safety Fund could not in any wise affect the defendant's right to demand this assessment pleaded in the answer; and the same refers to the premium in course of collection; because the policy in this case was made for the purpose of creating, maintaining and recreating a mortuary fund, within the limitation stated in the policy; for the reason that it is not alleged in the petition, nor in the reply, in this case that the Company had any reserve for premiums in course of collection, or mortuary fund, or that any such funds or the funds in the Safety Fund account with the Trustee precluded the defendant from making the assessment; and the proof offered is not confined to the issues made by the pleadings, nor has the defendant had any notice by the pleadings that such proof would be offered. And because the report from which the figures are offered in a statement of the affairs of the Company made to the Insurance Department of the State of Missouri, and the matters inquired about are not required to be set forth by law, and it is not shown that the statement is made within the knowledge—within the duties of the officer or agent who made them to the Insurance Department of Missouri.

By the Court: Objection overruled.

To which ruling of the Court the defendant then and there excepted and now excepts.

34 Said report for the year ending December 31, 1902, was in words and figures as follows:

"Hartford Life Insurance Company,

Hartford, Conn.

(Commenced Business 1867.)

George E. Keeney, President. Charles H. Bacall, Secretary.

I. Capital Stock.

Amount of capital paid up in cash	$500,000.00		
Amount of ledger assets (as per balance) December 31, of previous year		$2,687,383.81	
Extended at			$2,687,383.81

II. Income.

First year's premiums on original policies without deduction for commission or other expenses, less $350.18 for first year's reinsurance	$344,902.45		
Total new premiums		$344,902.45	
Renewal premiums without deduction for commissions or other expenses, less $660.80 for reinsurance on renewals	$2,036,267.49		
Dividends applied to pay renewal premiums.........	61,132.02		
Total renewal premiums		2,097,399.51	
Total premium income		$2,442,301.96	

Interest on mortgage loans	$12,276.18		
Interest on collateral loans	316.00		
Interest on bonds and dividends on stocks	20,130.73		
Interest on premium notes, policy loans or liens	2,886.68		
Interest on other debts due the company	57,290.27		
Rent from company's property, including $5,000.00 for company's own occupancy	14,830.92		
Total interest and rents		107,730.78	
Profit on sale or maturity of ledger assets		908.17	
From other sources:			
Overpayment (1901) death loss, returned		50.00	
Advance payments made		10,578.97	
Safety fund deposits		12,728.04	
Taxes collected		17,121.09	
Agents' surety deposits		1,200.00	
Total income			$2,592,619.01

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III. Disbursements.

For death claims, $1,720,463.40; additions, $543.00	$1,727,006.40		
Net amount paid for losses and matured endowments		$1,727,006.40	
Premium notes, voided by lapse		6,673.48	

Surrender values paid in cash	6,710.65	
Dividends applied to pay renewal premiums	61,132.02	
Total paid policyholders	$1,801,522.55	
Paid stockholders for interest or dividends	40,000.00	
Commissions and bonuses to agents (less commission on reinsurance), first year's premiums, $229,123.37; renewal premiums, $86,427.80	315,551.17	
Salaries and allowances for agents, including managers, agents and clerks	10,637.62	
Agency supervision, traveling and all other agency expenses	8,822.71	
Medical examiners' fees, $30,375.95; inspection of risks, $6,294.63	36,670.58	
Salaries and all other compensation of officers and home office employes	91,425.90	
Rent, including $5,000 for company's own occupancy	12,066.22	
Advertising, $9,373.50; printing and stationery, $8,669.22; postage, $9,529.97	27,672.69	
Legal expenses	6,071.57	
Furniture, fixtures and safes	11,476.60	
Insurance, taxes, licenses and department fees	33,979.54	
Taxes on real estate	3,693.04	
Repairs and expenses (other than taxes) on real estate	974.67	
Losses on sale or maturity of ledger assets	9,307.92	
All other disbursements: Advance payments applied	10,729.23	
Total disbursements		$2,420,502.01
Balance		$2,859,500.81

IV. Ledger Assets.

Book value of real estate	$235,621.08	
Mortgage loans on real estate, first liens	276,275.00	
Loans secured by pledge of bonds, stocks or other collateral	11,800.00	
Loans made to policyholders on this company's policies assigned as collateral	13,635.19	
Premium notes on policies in force	57,664.56	
Book value of bonds (excluding interest), $387,348.29; stocks, $89,665.95	477,014.24	
Deposited in trust companies and banks on interest	546,965.94	
Cash in company's office, $16,783.74; deposited in banks (not on interest), $11,848.83	28,632.57	
Bills receivable	1,000.00	
Safety fund in security company, Hartford	1,210,892.23	
Total ledger assets		$2,859,500.81

Non-ledger Assets.

Interest accrued on mortgages	$4,040.73	
Intrest accrued on bonds and stocks	5,457.78	
Interest accrued on collateral loans	140.45	
Interest accrued on premium notes, policy loans or liens	102.68	
Interest accrued on other assets	756.17	
Rents accrued on company's property or lease	819.24	
Total interest and rents due and accrued		11,317.05
Market value of real estate over book value		7,713.92
Market value (not including interest) of bonds and stocks over book value		5,418.76

	New business.	Renewals.	
Gross premiums due and unreported on policies in force December 31, 1902	$10,311.96	$47,033.22	
Gross deferred premiums on policies in force December 31, 1902	27,850.55	67,120.55	
Totals	$38,162.51	$114,153.77	
Deduct loading 60 and 6 per cent	22,897.51	6,849.22	
Net amount of uncollected and deferred premiums	$15,275.00	$107,304.55	122,579.55
All other assets: Premiums in course of collection, safety fund department			198,250.00
Gross assets			$3,204,780.00

Deduct Assets Not Admitted.

Bills receivable	$1,000.00	
Premium notes or loans on policies and net premiums in excess of the net value of their policies	106.00	
Book value of ledger assets over market value, viz: Depreciation in safety fund	34,330.98	
Total		35,436.98
Total admitted assets		$3,169,343.11

V. Liabilities.

Net present value of all the outstanding policies in force on the 31st day of December, 1902, as computed by the Connecticut Insurance Department, on the Actuaries' Table of Mortality, with 4 per cent interest	$486,906.00	
Same for reversionary additions	3,235.00	
Total	$490,141.00	
Deduct net value of risks of this company reinsured in other solvent companies	1,192.00	
Net reserve		488,949.00
Claims for death losses in process of adjustment or adjusted and not due	$117,819.00	
Claims for death losses which have been reported and no proofs received	96,500.00	
Claims for death losses and other policy claims resisted by the company	6,500.00	
Total policy claims		220,819.00
Premiums paid in advance, including surrender values so applied		2,116.00
Salaries, rents, office expenses, taxes, bills, accounts, bonuses, commissions, medical and legal fees due or accrued		3,000.00
Dividends or other profits due policyholders, including those contingent on payment of outstanding and deferred premiums		583.74
Dividends apportioned, payable to policyholders during 1903		1,298.86

Dividends apportioned, payable to policyholders subsequent to 1903:

10 year class 1909	$152.36	1910	$469.03	
15 year class 1914	77.33	1915	339.37	
20 year class 1919	3,279.33	1920	4,307.02	
	$3,509.02		$5,115.42	8,624.44
Other liabilities: Net safety funds				1,176,561.25
Special reserve and surplus on safety fund policies				352,640.92
Agents' surety deposits				1,200.00
Capital stock				500,000.00
Unassigned funds (surplus)				413,549.87
Total liabilities				$3,169,343.11

Exhibits of Policies.

Including Paid For Business Only.

The following is a correct statement of the business of the year on policy accounts as it stood at close of business, December 31:

Classification.	1. Whole life policies.		2. Endowment policies.		3. All other policies.		4. Return premiums and reversionary additions.	5. Total Nos. and amounts.	
	No.	Amount.	No.	Amount.	No.	Amount.	Amount.	No.	Amount.
At end of previous year	3,524	$5,525,297	879	$1,198,661	36,142	$67,446,154	$17,368	40,545	$74,187,480
New policies taking effect	162	269,188	2,561	3,803,419	3,616	5,106,693	13,845	6,339	9,183,145
Old policies revived	89	133,930	35	41,893	184	454,493	202	308	630,518
Old changed and increased	12	31,297	51	77,307	13	31,532	128	76	140,264
Totals	3,787	$5,949,712	3,526	$5,121,280	39,955	$73,038,872	$31,543	47,268	$84,141,407
Deduct ceased:									
By death	23	$34,569	17	$19,000	723	$1,531,300	$543	763	$1,585,412
By surrender	11	14,480	....	....	.....	....	......	11	14,480
By lapse	947	1,484,798	622	737,798	5,191	9,050,301	7,448	6,787	11,280,345
By change and decrease	14	$60,873	49	144,767	569	1,283,300	431	632	1,489,371
Total terminated	1,022	$1,594,720	688	$901,565	6,483	$11,864,901	$8,422	8,193	$14,369,608
Outstanding end of year	2,765	$4,354,992	2,838	$4,219,715	33,472	$61,173,971	$23,121	39,075	$69,771,799

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Premium Note Account.

Premium notes, loans or liens on hand December 31 of previous year	$41,795.92	
Received during year on new policies, $19,514.00; on old policies, $3,267.92..	22,781.92	
Total		$64,577.84
Deduction during the year as follows:		
Voided by lapse	$6,673.48	
Redeemed by maker in cash	239.80	
Total reduction of premium note account..........................		6,913.28
Balance of note assets at end of year..............................		$57,664.56

Business in Missouri During 1902.

	No.	Amount.
Policies on the lives of citizens of said State in force December 31 of previous year..	2,654	$57,680.50
Policies on the lives of citizens of said State issued during the year	521	8,919.76
Total	3,175	$6,660,026.00
Deduct ceased to be in force during the year............................	621	1,346,280.00
Policies in force, December 31..................................	2,554	$5,313,746.00

Losses and claims unpaid December 31 of previous year	2	$6,500.00
Losses and claims incurred during the year	50	117,000.00
Total	52	$123,500.00
Losses and claims settled during the year, in cash, $110,433.00; by compromise, $1,067.00	44	111,500.00
Unpaid December 31, 1902	8	$12,000.00
Premiums collected or secured in cash and notes or credits without any deduction for losses, dividends, commissions or other expenses		$214,264.42"

By Mr. Fyke (reading from report): This is 134, page 425, premiums in course of collection: Safety Fund Department, $198,250; net safety funds, $1,176,561.25; special reserve and surplus of Safety Fund policies, $352,640.92.

By Mr. Fyke: Now, we offer sworn report of the defendant to the Insurance Department of this State, of the condition of its business on the 31st day of December, 1903, Volume 35th, Missouri Insurance Report, page 468.

40 By Mr. Jones: We interpose the objection that it is irrelevant, immaterial and incompetent, as evidence in the case.

We object to that for the reason that it doesn't appear that any of these funds are funds concerned in the matter of controversy, or related in any manner to these contracts, and because whatever was in the Safety Fund could not in any wise affect the defendant's right to demand this assessment pleaded in the answer; and the same refers to the premium in course of collection; because the policy in this case was made for the purpose of creating, maintaining and recreating a mortuary fund, within the limitation stated in the policy. For the reason that it is not alleged in the petition, nor the reply, in this case that the Company had any reserve for premiums in course of collection, or mortuary fund, or that any such funds or the funds in the Safety Fund account with the Trustee precluded the defendant from making the assessment; and the proof offered is not confined to the issues made by the pleadings, nor has the defendant had any notice by the pleadings that such proof would be offered. And because the report from which the figures are offered is a statement of the affairs of the Company made to the Insurance Department of the State of Missouri, and the matters inquired about are not required to be set forth by law, and it is not shown that the statement is made within the knowledge—within the duties of the officer or agent who made them to the Insurance Department of Missouri.

By the Court: Objection overruled.

To which ruling of the Court the defendant then and there excepted and now excepts.

41 Said report for the year ending December 31, 1903, was in words and figures as follows:

"Hartford Life Insurance Company.

Hartford, Conn.

(Commenced Business 1867.)

George E. Keeney, President. Charles H. Bacall, Secretary.

I. Capital Stock.

Amount of capital paid up in cash	$500,000.00		
Amount of ledger assets (as per balance) December 31, of previous year		$2,859,500.81	
Extended at			$2,859,500.81

II. Income.

First year's premiums on original policies without deduction for commission or other expenses, less $5,827.84 for first year's reinsurance	$375,392.45		
Total new premiums		$375,392.45	
Renewal premiums without deduction for commissions or other expenses, less $489.05 for reinsurance on renewals	1,956,633.33		
Dividends applied to pay renewal premiums	65,372.15		
Total renewal premiums		2,022,005.48	
Total premium income		$2,397,397.93	

Interest on mortgage loans	$13,639.57		
Interest on collateral loans	4,888.89		
Interest on bonds and dividends on stocks	23,936.17		
Interest on premium notes, policy loans or liens	7,403.35		
Interest on other debts due the company	38,613.74		
Rent from company's property, including $3,500.00 for company's own occupancy	13,177.49		
Total interest and rents		101,659.21	
From other sources:			
Safety fund deposits		8,153.25	
Advance payments made		6,873.34	
Taxes collected		18,079.92	
Income accident department		1,247.65	
Total income			$2,533,411.30

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III. Disbursements.

Net amount paid for losses		$1,578,132.33
Premium notes, voided by lapse		2,292.17
Surrender values paid in cash		4,239.69
Dividends applied to purchase paid-up additions and annuities		65,372.15
(Total paid policyholders, $1,650,035.34.)		
Paid stockholders for interest or dividends		40,000.00

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Commissions and bonuses to agents (less commission on reinsurance) first year's premiums, $317,199.56; renewal premiums, $101,972.06	419,171.62	
Salaries and allowances for agents, including managers, agents and clerks	11,597.25	
Agency supervision, traveling and all other agency expenses	19,553.31	
Medical examiners' fees, $30,821.47; inspection of risks, $4,881.00	35,702.47	
Salaries and all other compensation of officers and home office employes	95,459.78	
Rent, including $3,500 for company's own occupancy	3,500.00	
Advertising, $10,728.82; printing and stationery, $12,092.83; postage, $9,970.03	32,791.68	
Legal expenses	8,061.03	
Furniture, fixtures and safes	16,744.04	
Insurance, taxes, licenses and department fees	36,368.99	
Taxes on real estate	3,984.14	
Losses on sale or maturity of ledger assets	942.62	
All other disbursements:		
Agents' deposits	1,200.00	
Expenses accident department	812.71	
Advance payments applied	7,049.60	
Total disbursements		$2,382,975.58
Balance		$3,009,936.53

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IV. Ledger Assets.

Book value of real estate, unincumbered	$234,706.00	
Mortgage loans on real estate, first liens	373,525.00	
Loans secured by pledge of bonds, stocks or other collateral	10,407.50	

Loans made to policyholders on this company's policies assigned as collateral	32,027.11	
Premium notes on policies in force	72,157.30	
Book value of bonds (excluding interest), $468,874.42; stocks, $89,640.58	558,515.00	
Deposited in trust companies and banks on interest	514,434.06	
Cash deposited in banks	9,876.91	
In hands of adjustor and branch offices	1,462.34	
Safety funds in security company, Hartford	1,202,910.31	
Total	$3,011,021.53	
Less agent's credit balances	1,085.00	
Total ledger assets		$3,009,936.53

Non-ledger Assets.

Interest accrued on mortgages	$5,174.55	
Interest accrued on bonds and stocks	5,322.43	
Interest accrued on collateral loans	130.80	
Interest accrued on other assets	35,551.08	
Rents accrued on company's property or lease	575.11	
Total interest and rents due and accrued		14,753.97
Market value of real estate over book value		3,424.00

	New business.	Renewals.	
Gross premiums due and unreported on policies in force December 31, 1903	$3,538.27	$59,336.48	
Gross deferred premiums on policies in force December 31, 1903	20,082.26	81,657.85	
Totals	$23,620.53	$140,994.33	
Deduct loading 60 and 6 per cent	14,172.32	8,459.66	
Net amount of uncollected and deferred premiums	$9,448.21	$132,534.67	141,982.88
All other assets: Premiums in course of collection, safety fund department			201,250.00
Gross assets			$3,371,347.38

Deduct Assets Not Admitted.

Premium notes or loans on policies and net premiums in excess of the net value of their policies	$169.40	
Book value of ledger assets over market value viz:		
Stocks and bonds	7,124.00	
Depreciation in safety funds	65,535.03	
Total		72,828.43
Total admitted assets		$3,298,518.95

V. Liabilities.

Net present value of all the outstanding policies in force on the 31st day of December, 1903, as computed by the Connecticut Insurance Department, on the Actuaries and American tables of mortality, with four and three and one-half per cent interest	$692,777.00	
Same for reversionary additions	3,566.00	
Total	$696,343.00	
Deduct net value of risks of this company reinsured in other solvent companies	4,433.00	
Net reserve		$691,910.00
Claims for death losses in process of adjustment or adjusted and not due	$117,298.80	
Claims for death losses which have been reported and no proof received	127,651.00	
Claims for death losses and other policy claims resisted by the company	6,000.00	
Total policy claims		250,949.80
Premiums paid in advance		1,767.27
Salaries, rents, office expenses, taxes, bills, accounts, bonuses, commissions, medical and legal fees accrued		3,000.00
Balance of taxes to credit of members		241.02
Dividends or other profits due policyholders, including those contingent on payment of outstanding and deferred premiums		451.90
Dividends apportioned, payable to policyholders during 1904		1,576.57

Dividends apportioned, payable to policyholders during 1904 ....

Dividends apportioned, payable to policyholders subsequent to 1904:

Year.	10-year class.	Year.	15-year class.	Year.	20-year class.	
1909	$188.73	1914	$103.28	1919	$4,288.53	
1910	693.54	1915	512.11	1920	6,617.34	
1911	151.10	1916	287.22	1921	3,940.03	
	$1,033.37		$902.61		$14,845.90	16,781.88

Net safety funds in security company	1,137,375.28
Other liabilities:	
Liabilities accident department	623.82
Special reserve and surplus on safety fund policies	306,091.99
Capital stock	500,000.00
Unassigned funds (surplus)	387,749.42
Total liabilities	$3,298,518.95

Exhibit of Policies.

Including Paid For Business Only.

The following is a correct statement of the business of the year on policy accounts as it stood at close of business, December 31:

Classification.	1. Whole life policies. No.	Amount.	2. Endowment policies. No.	Amount.	3. Term and other policies including return premium additions. No.	Amount.	4. Additions to policies by dividends. Amount.	5. Total Nos. and amounts. No.	Amount.
At end of previous year	2,765	$4,354,992	2,838	$4,219,715	33,472	$61,193,016	$4,076	39,076	$69,771,999
Issued during year	364	422,886	3,414	6,363,571	2,700	4,469,821	219	6,478	11,256,497
Revived during year	23	27,500	71	120,504	114	200,730	......	208	348,734
Increase during year	....	....	....	....	.....	24,399	......	.....	24,399
Totals before transfers	3,152	$4,805,378	6,323	$10,703,790	36,286	$65,887,966	......	.....	....
Transfers, deductions	57	$127,673	8	$24,246	14	$37,472	......	.....	....
Transfers, additions	16	43,956	20	60,888	43	84,547	......	.....	....
Balance of transfers	41	$83,717	12	$36,642	29	$47,075	......	.....	....
Totals after transfers	3,111	$4,721,661	6,335	$10,740,432	26,315	$65,935,041	$4,295	45,761	$81,401,429
Deduct ceased:									
By death	32	$44,438	32	$47,500	697	$1,498,504	......	761	$1,590,442
By surrender	19	29,212	3	15,000	.....	....	......	22	44,212
By lapse	354	376,791	1,554	2,164,966	3,191	4,930,455	......	5,099	7,472,212
By change and decrease	....	71,104	....	42,103	38	146,832	......	38	260,039
Total terminated	405	$521,545	1,589	$2,269,569	3,926	$6,575,719	......	5,920	$9,366,905
Outstanding end of year	2,706	$4,200,116	4,746	$8,470,863	32,389	$59,359,250	$4,295	39,841	$72,034,524
Policies reinsured	3	$19,393	23	$477,527	4	$25,500	......	30	$522,420

Premium Note Account.

Premium notes, loans or liens on hand December 31 of previous year	$57,664.56	
Received during the year on new policies	19,234.28	
Total		$76,898.84
Deductions during the year as follows:		
Used in payment of losses and claims	$1,819.00	
Voided by lapse	2,805.24	
Redeemed by maker in cash	117.30	
Total reduction of premium note account		4,741.54
Balance of note assets at end of year		$72,157.30

Business in Missouri During 1903.

	No.	Amount.
Policies on the lives of citizens of said State in force December 31 of previous year	2,554	$5,313,746.00
Policies on the lives of citizens of said State issued during the year	376	1,515,364.00
Total	2,930	$6,829,110.00
Deduct ceased to be in force during the year	440	910,792.00
Policies in force, December 31	2,490	$5,918,318.00
Losses and claims unpaid December 31 of previous year	8	$12,000.00
Losses and claims incurred during the year	39	85,500.00
Total	47	$97,500.00
Losses and claims settled during the year, in cash, $87,265; by compromise, $1,735	43	89,000.00
Losses and claims unpaid December 31	4	$8,500.00
Premiums collected or secured in cash and notes or credits, including industrial, without any deduction for losses, dividends, commissions or other expenses		$205,437.00"

By Mr. Fyke (reading from report): First item, pg. 467: Premiums in course of collection Safety Fund Department, $201,250. Balance taxed to credit of members, $241.02; Net Safety Fund in Security Co., $1,137,375.28; Special Reserve and Surplus of Safety Fund policies, $306,091.99.

By Mr. Fyke: Now, we offer the verified report of the defendant to the Insurance Department of Missouri, of the condition of its business on December 31, 1904, volume 36. First item, page
47 467: "Net premiums in safety fund department in course of
collection, $214,250; balance taxed to credit of members, $3,685.13; net safety funds in Security Company, $1,138,044.34.

By Mr. Jones: We interpose the objection that it is irrelevant, immaterial and incompetent, as evidence in the case.

We object to that for the reason that it doesn't appear that any of these funds are funds concerned in the matter of controversy, or related in any manner to these contracts, and because whatever was in the safety fund could not in any wise affect the defendant's right to demand this assessment pleaded in the answer; and the same refers to the premium in course of collection, because the policy in this case was made for the purpose of creating, maintaining and recreating a mortuary fund, within the limitation stated in the policy. For the reason that it is not alleged in the petition, nor in the reply, in this case that the company had any reserve for premiums in course of collection, or mortuary fund, or that any such funds or the funds in the safety fund account with the Trustee precluded the defendant from making the assessment; and the proof offered is not confined to the issues made by the pleadings, nor has the defendant had any notice by the pleadings that such proof would be offered. And because the report from which the figures are offered is a statement of the affairs of the company made to the Insurance Department of the State of Missouri, and the matters inquired about are not required to be set forth by law, and it is not shown that the statement is made within the knowledge—within the duties of the officer or agent who made them to the Insurance Department of Missouri.

By the Court: Objection overruled.

To which ruling of the Court the defendant then and there excepted and now excepts.

48 Said report for year ending December 31, 1904, was in
words and figures as follows:

"Hartford Life Insurance Company.

Hartford, Conn.

(Commenced Business 1867.)

George E. Keeney, President. Charles H. Bacall, Secretary.

I. Capital Stock.

Amount of capital paid up in cash	$500,000.00		
Amount of ledger assets (as per balance), December 31, of previous year		$3,009,936.53	
Extended at			$3,009,936.53

II. Income.

First year's premiums on original policies without deduction for commission or other expenses, less $1,770.33 for first year's reinsurance	$205,243.47	
Total new premiums		$205,243.47
Renewal premiums without deduction for commissions or other expenses, less $4,786.44 for reinsurance on renewals	2,133,664.12	
Dividends applied to pay renewal premiums	50,645.56	
Total renewal premiums		2,184,309.68
Total premium income		$2,389,553.15

Interest on mortgage loans	$16,377.10		
Interest on collateral loans	441.19		
Interest on bonds and dividends on stocks	24,591.28		
Interest on premium notes, policy loans or liens	6,046.61		
Interest on other debts due the company	52,033.36		
Rent from company's property, including $3,500.00 for company's own occupancy	13,200.85		
Total interest and rents		$112,690.39	
From other sources:			
Accident premiums, $788.52, less reinsurance, $264.55		523.97	
Safety fund deposits		4,687.79	
Taxes received		14,379.23	
Advance payments made		8,018.48	
Total income			$2,529,853.01

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III. Disbursements.

For death claims	$1,731,029.93	
Net amount paid for losses		$1,731,029.93
Premium notes, voided by lapse		2,068.81
Surrender values paid in cash		13,935.69
Dividends applied to pay renewal premiums		50,645.56

(Total paid policyholders, $1,797,679.99.)

Paid stockholders for interest or dividends	40,000.00	
Commissions and bonuses to agents (less commission on reinsurance), first year's premiums, $180,991.70; renewal premiums, $60,021.47	241,013.19	
Commuting renewal commissions	8,267.69	
Salaries and allowances for agents, including managers, agents and clerks	21,348.09	
Agency supervision, traveling, and all other agency expenses	7,630.60	
Medical examiners' fees, $22,059.22; inspection of risks, $10,605.73	32,664.95	
Salaries and all other compensation of officers and home office employes	88,854.80	
Rent, including $3,500.00 for company's own occupancy	5,275.87	
Advertising, $7,307.19; printing and stationery, $7,203.24; postage, $8,260.91	22,771.34	
Legal expenses	6,334.45	
Furniture, fixtures and safes and office expenses	11,362.89	
Insurance, taxes, licenses and department fees	30,454.37	
Taxes on real estate	4,010.40	
Repairs and expenses (other than taxes) on real estate	511.30	
Losses on sale or maturity of ledger assets	2,189.20	
All other disbursements:		
Advance payments applied	8,336.61	
Total disbursements		$2,328,705.74
Balance		$3,211,083.80

IV. Ledger Assets.

Book value of real estate, unincumbered	$230,906.00
Mortgage loans on real estate, first liens	368,600.00
Loans secured by pledge of bonds, stock, or other collateral	10,213.15
Loans made to policyholders on this company's policies assigned as collateral	54,612.91

Premium notes on policies in force, of which $1,831.92 is for first year's premiums	70,667.06	
Book value of bonds (excluding interest), $568,881.92; stocks, $97,430.58	666,312.50	
Deposited in trust companies and banks on interest	558,711.59	
Cash in company's office, $20,355.16; deposited in banks (not on interest), $27,757.84	48,113.00	
Safety funds in security company, Hartford	1,203,947.59	
Total	$3,212,083.80	
Less agents' deposits	1,000.00	
Total ledger assets		$3,211,083.80

Non-ledger Assets.

Interest accrued on mortgages	$5,226.08	
Interest accrued on bonds and stocks	6,089.60	
Interest accrued on collateral loans	99.86	
Interest accrued on other assets	2,061.25	
Rents accrued on company's property or lease	804.95	
Total interest and rents due and accrued		14,281.74
Market value of real estate over book value		5,674.00
Market value, not including interest, of bonds and stocks over book value	3,614.50	

	New business.	Renewals.	
Gross premiums due and unreported on policies in force December 31, 1904	$1,311.14	$100,984.75	
Gross deferred premiums on policies in force December 31, 1904	10,340.04	79,240.86	
Totals	$11,651.18	$180,225.61	
Deduct loading 20 per cent	2,330.24	36,045.12	
Net amount of uncollected and deferred premiums	$9,320.24	$144,180.49	153,501.43
All other assets:			
Net premiums in Safety Fund Department in course of collection			214,250.00
Gross assets			$3,602,405.47

Deduct Assets Not Admitted.

Premium notes or loans on policies and net premiums in excess of the net values of their policies		$995.00	
Book value of ledger assets over market value, viz:			
Depreciation in safety funds		65,903.25	
Total			66,898.25
Total admitted assets			$3,535,507.22

V. Liabilities.

Net present value of all the outstanding policies in force on the 31st day of December, 1904, as computed by the company on the Combined Experience and American Table of Mortality with four, three and three and one-half per cent interest	$838,291.47	
Same for reversionary additions	3,533.00	
Total	$841,824.47	
Deduct net value of risks of this company reinsured in other solvent companies	4,639.00	
Net reserve		$837,185.47
Claims for death losses in process of adjustment of adjusted and not due	$179,221.00	
Claims for death losses which have been reported and no proofs received	65,700.00	
Claims for death losses and other policy claims resisted by the company	13,000.00	
Total policy claims		257,921.00
Premiums paid in advance, including surrender values so applied		10,011.70
"Cost of Collection" on uncollected and deferred premiums, in excess of the loading thereon		5,825.59
Salaries, rents, office expenses, taxes, bills, accounts, bonuses, commissions, medical and legal fees accrued		3,000.00
Balance of taxes to credit of members		3,685.13
Dividends or other profits due policyholders, including those contingent on payment of outstanding and deferred premiums		1,365.73
Dividends apportioned, payable to policyholders during 1904		1,011.04

Dividends apportioned payable to policyholders subsequent to 1904:

Dividends apportioned payable to policyholders subsequent to 1904:

Year.	10-year class.	Year.	15-year class.	Year.	20-year class.	
1909	$282.25	1914	$162.58	1919	$5,530.59	
1910	1,221.23	1915	750.79	1920	9,010.89	
1911	281.25	1916	465.89	1921	5,903.06	
1912	227.29	1917	242.07	1922	2,309.95	
Totals	$2,013.12		$1,621.33		$22,754.49	26,388.94

Other liabilities:

Net safety funds in security company	1,138,044.34
Special reserve and surplus on safety fund policies	324,316 26
Capital stock	500,000.00
Unassigned funds (surplus)	426,752.02
Total liabilities	$3,535,507.22

Exhibit of Policies.

Including Paid For Business Only.

The following is a correct statement of the business of the year on policy accounts as it stood at close of business, December 31:

Classification.	1. Whole life policies.		2. Endowment policies.		3. Term and other policies including return premium additions.		4. Additions to policies by dividends.	5. Total Nos. and amounts.	
	No.	Amount.	No.	Amount.	No.	Amount.	Amount.	No.	Amount.
At end of previous year	2,706	$4,200,116	4,746	$8,470,863	32,389	$59,359,250	$4,295	39,481	$72,034,524
Issued during year	524	768,328	2,415	3,622,623	1,507	2,177,470	......	4,446	6,568,421
Revived during year	2	2,000	15	27,000	62	159,561	......	79	188,561
Increased during year	....	....	....	....	.....	35,472	100	.....	35,572
Totals	3,232	$4,970,444	7,176	$12,120,486	33,598	$61,731,753	$4,395	44,366	$78,827,078
Deduct ceased:									
By death	33	$48,384	50	$82,275	744	$1,628,739	......	827	$1,759,398
By expiry	....	....	....	....	1	1,000	......	1	1,000
By surrendered	46	71,744	8	8,000	.....	....	$70	54	79,814
By lapse	192	257,000	1,837	2,835,823	3,328	5,807,845	......	5,357	8,900,668
By decrease	....	197,541	....	50,060	1	102,194	......	1	349,795
Total terminated	271	$574,669	1,895	$2,976,158	4,074	$7,539,778	$70	6,240	$11,090,675
Outstanding end of year	2,961	$4,395,775	5,281	$9,144,328	29,884	$54,191,975	$4,325	38,126	$67,736,403
Policies reinsured	3	$17,393	48	$446,514	1	$12,500	......	52	$476,407

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Premium Note Account.

Premium notes, loans or liens on hand December 31 of previous year	$72,157.30	
Received during the year on new policies, $1,831.92; on old policies, $2,864.39	4,696.31	
Total		$76,853.61
Deductions during the year as follows:		
Used in payment of losses and claims	$265.60	
Used in purchase of surrendered policies	1,292.69	
Voided by lapse	2,068.81	
Redeemed by maker in cash	2,559.45	
Total reduction of premium note account		6,186.55
Balance of note assets at end of year		$70,667.06

Business in Missouri During 1904.

	No.	Amount.
Policies on the lives of citizens of said State in force December 31 of previous year	2,490	$5,918,318.00
Policies on the lives of citizens of said State issued during the year	98	314,389.00
Total	2,588	$6,232,707.00
Deduct ceased to be in force during the year	343	944,913.00
Policies in force, December 31	2,245	$5,287,794.00

Losses and claims unpaid December 31 of previous year	4	$8,500.00
Losses and claims incurred during the year	66	171,500.00
Total	70	$180,000.00
Losses and claims settled during the year, in cash, $144,850.00; by compromise, $1,500.00	61	146,350.00
Losses and claims unpaid December 31	9	$33,650.00
Premiums collected or secured in cash and notes or credits, including industrial, without any deduction for losses, dividends, commissions or other expenses		$170,990.02"

By Mr. Fyke (reading from report): Special reserve on Safety Fund deposit, $314,316.26.

By Mr. Fyke: Now we offer verified report of the defendant to the Insurance Department of Missouri of the condition of its business on December 31, 1905, volume 37th, page 624.

54 By Mr. Jones: We interpose the objection that it is irrelevant, immaterial and incompetent as evidence in the case. We object to that for the reason that it doesn't appear that any of these funds are funds concerned in the matter of controversy, or related in any manner to these contracts, and because whatever was in the safety fund could not in any wise affect the defendant's right to demand this assessment pleaded in the answer; and the same refers to the premium in course of collection, because the policy in this case was made for the purpose of creating, maintaining and recreating a mortuary fund, within the limitation stated in the policy; for the reason that it is not alleged in the petition, nor the reply in this case that the company had any reserve for premiums in course of collection, or mortuary fund, or that any such funds or the funds in the safety fund account with the Trustee precluded the defendant from making the assessment; and the proof offered is not confined to the issues made by the pleadings, nor has the defendant had any notice by the pleadings that such proof would be offered. And because the report from which the figures are offered is a statement of the affairs of the company made to the Insurance Department of the State of Missouri, and the matters inquired about are not required to be set forth by law, and it is not shown that the statement is made within the knowledge—within the duties of the officer or agent that made them to the Insurance Department of Missouri.

By the Court: Objection overruled.

To which ruling of the Court the defendant then and there excepted and now excepts.

55 Said report for the year ending December 31, 1905, was in words and figures as follows:

"Hartford Life Insurance Company.

Hartford, Conn.

(Commenced Business April, 1867.)

George E. Keeney, President. Charles H. Bacall, Secretary.

I. Capital Stock.

Amount of capital paid up in cash	$500,000.00		
Amount of ledger assets (as per balance) December 31, of previous year		$3,211,083.80	
Extended at			$3,211,083.80

II. Income.

First year's premiums on original policies without deduction for commission or other expenses, less $296.23 for first year's reinsurance	$121,671.09		
Total first year premiums on original policies	$121,671.09		
Dividends applied to purchase paid additions and annuities	53.42		
Total new premiums		$121,724.51	
Renewal premiums without deduction for commissions or other expenses, less $306.12 for reinsurance on renewals	1,940,029.71		
Dividends applied to pay renewal premiums	52,827.22		
Total renewal premiums		$1,992,856.93	
Total premium income		$2,114,581.44	
Interest on mortgage loans	$17,292.31		
	174.15		

Interest on mortgage loans	$17,292.31		
Interest on collateral loans	174.15		
Interest on bonds and dividends on stocks	70,817.34		
Interest on premium notes, policy loans or liens	6,809.75		
Interest on other debts due the company	7,993.39		
Rent from company's property, including $3,500.00 for company's own occupancy	14,207.46		
Total interest and rents		117,294.40	
Profit on sale or maturity of ledger assets		1,025.00	
From other sources, viz:			
Reinsurance premiums returned on cancelled policies		2,750.03	
Dues from safety fund department		145,430.40	
Accident premiums		407.19	
Advance payments in safety fund department		9,179.83	
Total income			$2,390,668.29

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III. Disbursements.

For death claims, $1,744,835.15; additions, 3,742.36	$1,748,577.51	
Net amount paid for losses and matured endowments		$1,748,577.51
Premium notes, voided by lapse		9,703.42
Surrender values paid in cash		21,674.10
Dividends applied to pay renewal premiums		52,827.22
Dividends applied to purchase paid-up additions and annuities		53.42

(Total paid policyholders, $1,832,835.67.)

Paid stockholders for interest or dividends	40,000.00	
Commissions and bonuses to agents (less commission on reinsurance), first year's premiums, $68,116.36; renewal premiums, $40,659.96	108,776.32	
Salaries and allowances for agencies, including managers, agents and clerks	17,243.16	
Agency supervision, traveling and all other agency expenses	12,985.79	
Medical examiners' fees, $9,835.14; inspection of risks, $7,894.44	17,729.58	
Salaries and all other compensation of officers and home office employes	87,144.02	
Rent, including $3,500.00 for company's own occupancy	7,047.43	
Advertising, $7,869.77; printing and stationery, $8,571.82; postage, $7,330.48	23,772.07	
Legal expenses	7,712.25	
Insurance, taxes, licenses and department fees	30,187.51	
Taxes on real estate	3,899.18	
Repairs and expenses (other than taxes) on real estate	3,867.30	
Losses on sale or maturity of ledger assets	3,385.50	
All other disbursements, viz:		
Tax on capital stock	2,536.71	
Directors' fees	310.00	
Agents' bond premiums	359.07	
Fire insurance	1,027.22	
Accident commissions	63.29	
Reinsurance accident premiums	301.47	
Office expense	5,272.87	
Safety fund credits	1,881.32	
Advance payments applied	8,955.34	
Total disbursements		$2,217,293.07
Balance		$3,384,459.02

Balance ....

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IV. Ledger Assets.

Book value of real estate, unincumbered	$219,806.00	
Mortgage loans on real estate, first liens	661,000.00	
Loans made to policyholders on this company's policies assigned as collateral	82,687.96	
Premium notes on policies in force	61,003.29	
Book value of bonds (excluding interest), $602,718.17; stocks, $139,468.08.	742,186.25	
Deposited in trust companies and banks on interest	132,893.37	
Cash in company's office, $10,172.57; deposited in banks (not on interest), $244,021.51	254,194.08	
Agents' balances	27,539.30	
Safety funds in Security Company of Hartford	1,203,148.77	
Total ledger assets		$3,384,459.02

Non-ledger Assets.

Interest due, $177.86, and accrued, $13,250.33, on mortgages	$13,428.19	
Interest accrued on bonds and stocks	22,941.88	
Interest due on premium notes, policy loans or liens	404.70	
Interest accrued on other assets	1,391.95	
Rents accrued on company's property or lease	844.53	
Total interest and rents due and accrued		39,011.25
Market value of real estate over book value		6,994.00
Market value, not including interest, of bonds and stocks over book value		2,305.38

	New business.	Renewals.	
Gross premiums due and unreported on policies in force December 31, 1905	$817.20	$46,307.07	
Gross deferred premiums on policies in force December 31, 1905	6,766.43	67,673.84	
Totals	$7,583.63	$113,980.91	
Deduct loading	5,308.53	22,796.18	
Net amount of uncollected and deferred premiums	$2,275.10	$91,184.73	93,459.83
Net premiums in Safety Fund Department in course of collection			146,000.00
Gross assets			$3,672,229.48

Deduct Assets Not Admitted.

Agents' debit balances	$27,539.30	
Book value of ledger assets over market value, viz: Safety funds	66,761.66	
Total		94,300.96
Total admitted assets		$3,577,928.52

V. Liabilities.

Net present value of all the outstanding policies in force on the 31st day of December, 1905, as computed by the company, on the Actuaries' and American Tables of Mortality, with 4 and 3½ per cent interest	$970,916.23	
Same for reversionary additions	811.00	
Total	$971,727.23	
Deduct net value of risks of this company reinsured in other solvent companies	2,510.00	
Net reserve		$969,217.23
Claims for death losses due and unpaid	$13,521.67	
Claims for death losses in process of adjustment or adjusted and not due	97,500.00	
Claims for death losses which have been reported and no proofs received	58,534.00	
Claims for death losses and other policy claims resisted by the company	28,224.60	
Total policy claims		197,780.27
Premiums paid in advance, including surrender values so applied		10,181.45
"Cost of collection" on uncollected and deferred premiums, in excess of the loading thereon		758.36
Salaries, rents, office expenses, taxes, bills, accounts, bonuses, commissions, medical and legal fees due or accrued		3,000.00
Dividends or other profits due policyholders, including those contingent on payment of outstanding and deferred premiums		819.42
Dividends apportioned, payable to policyholders during 1906		1,431.49
Dividends apportioned, payable to policyholders subsequent to 1906		33,549.16
Seven-year class, 1907 to 1912		2,414.28

Other liabilities:	
Net safety funds in security company	1,152,975.30
Balance of taxes to credit of members in safety fund department	7,053.60
Special reserve and surplus on safety fund policies	221,387.35
Capital stock	500,000.00
Unassigned funds (surplus)	477,360.61
Total liabilities	$3,577,928.52

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Exhibit of Policies.

Including Paid For Business Only.

The following is a correct statement of the business of the year on policy accounts as it stood at close of business, December 31:

Classification.	1. Whole life policies. No.	1. Whole life policies. Amount.	2. Endowment policies. No.	2. Endowment policies. Amount.	3. Term and other policies including return premium additions. No.	3. Term and other policies including return premium additions. Amount.	4. Additions to policies by dividends. Amount.	5. Total Nos. and amounts. No.	5. Total Nos. and amounts. Amount.
At end of previous year	2,961	$4,395,775	5,281	$9,144,328	29,884	$54,191,975	$4,325	38,126	$67,736,403
Issued during year	946	1,349,000	1,106	1,601,519	461	679,670	......	2,513	3,630,189
Revived during year	5	8,432	14	23,000	23	51,920	......	42	83,352
Increased during year	1	1,000	....	....	.....	24,612	127	1	25,739
Totals before transfers	3,913	$5,754,207	6,401	$10,768,847	30,368	$54,948,177	......	.....	....
Transfers, deductions	9	$14,000	8	$11,000	5	$7,000	......	.....	....
Transfers, additions	9	12,000	9	12,500	4	7,500	......	.....	....
Balance of transfers	....	$2,000	1	$1,500	1	$500	......	.....	....
Totals after transfers	3,913	$5,752,207	6,402	$10,770,347	30,367	$54,948,677	$4,452	40,682	$71,475,683
Deduct ceased:									
By death	29	$46,681	37	$50,534	747	$1,609,066	$3,384	813	$1,709,665
By expiry	....	....	....	....	48	61,400	......	48	61,400
By surrender	12	13,720	20	54,017	7	38,052	88	39	105,877
By lapse	335	690,190	1,886	4,143,450	3,019	4,842,557	......	5,240	9,676,197
By decrease	....	5,350	....	34,173	.....	77,520	......	.....	117,043
Total terminated	376	$755,941	1,943	$4,282,174	3,821	$6,628,595	$3,472	6,140	$11,670,182
Outstanding end of year	3,537	$4,996,266	4,459	$6,488,173	26,546	$48,320,082	$980	34,542	$59,805,501
Policies reinsured	3	$19,393	8	55,461	.....	....	......	11	$74,854

Premium Note Account.

Premium notes, loans or liens on hand December 31 of previous year	$70,667.06	
Received during the year on new policies, $102.79; on old policies, $3,317.30	3,420.09	
Restored by revival of policies	731.76	
Total		$74,818.91
Deductions during the year as follows:		
Used in payment of losses and claims........	$27.54	
Used in purchase of surrendered policies	2,738.27	
Voided by lapse	10,001.73	
Redeemed by maker in cash	1,048.08	
Total reduction of premium note account........		13,815.62
Balance of note assets at end of year........		$61,003.29

Business in Missouri During 1905.

	No.	Amount.
Policies on the lives of citizens of said State in force December 31 of previous year...	2,245	$5,287,794.00
Policies on the lives of citizens of said State issued during the year	131	176,488.00
Total	2,376	$5,464,282.00

Deduct ceased to be in force during the year	383	1,501,327.00
Policies in force, December 31	1,993	$3,962,955.00
Losses and claims unpaid December 31 of previous year	9	$33,650.00
Losses and claims incurred during the year	44	96,000.00
Total	53	$129,650.00
Losses and claims settled during the year, in cash, $109,650; by compromise, $2,000.	45	111,650.00
Losses and claims unpaid December 31	8	18,000.00
Premiums collected or secured in cash and notes or credits without any deductions for losses, dividends, commissions or other expenses		$159,217.22

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Gain and Loss Exhibit During 1905.

(Upon Company's Basis of Computation.)

Credits.

Divisible surplus, December 31, 1904		$426,752.02
Total gross premium receipts	$2,193,115.28	
Deduct total net premiums	1,918,848.96	
Loading earned		274,266.32
Interest, dividends and rents	$143,136.46	
Profit and loss items—loss	1,365.50	
Interest earned	$141,770.96	
Increase in market values	10.88	
		141,781.84
Expected mortality on insurance	$1,820,016.43	
Deduct expected mortality on reserve	10,363.40	
Expected mortality on net amount at risk		1,809,653.03
Reserves released on surrendered and lapsed policies		105,171.68
(Of the above, $52,460.87 was from policies upon which three years' premiums had not been paid.)		
Dividends released on surrendered and lapsed policies		139.52
Total credits		$2,757,764.41

Debits.

Expenses incurred:			
Insurance		$319,699.97	
Investment		13,538.76	
Total management expenses			$333,238.73
Interest required to be earned to maintain revserve			31,612.00
Death losses incurred		$1,765,414.05	
Total		$1,765,414.05	
Deduct.			
Reserves released by death of insured	$14,758.66		
Compromise on losses	11,295.12	26,053.78	
Actual net mortality on insurance			1,739,360.27
Cash values paid for surrendered and lapsed policies		$31,377.52	
Values applied to purchase extended insurance		1,026.02	
Values applied to purchase paid-up insurance		33,377.08	
			65,780.62
Dividends paid to policyholders		$52,880.64	
Increase in deferred apportioned dividends		9,966.05	
Total dividends incurred to policyholders			62,846.69
Dividends to stockholders			40,000.00
Special credits or reserves to policyholders not herein provided for: Balance of interest accrued on safety funds			7,565.49
Divisible surplus, December 31, 1905			477,360.61
Total debits			$2,757,764.41

Source of Net Gains or Losses, Distributions to Policyholders and Payments to Stockholders.

Divisible surplus, December 31, 1904		$426,752.02
Loss from loading	$58,972.41	
Gain from mortality	70,292.76	
Gain from surrendered and lapsed policies	39,530.58	
Gain from surplus interest	110,158.96	
Total realized—gain	161,009.89	
Increase in market values	10.88	
Surplus earned during the year		161,020.77
Total		$587,772.79
Distribution from surplus:		
Dividends applied by policyholders in reduction of premiums	$52,827.22	
Dividends applied by policyholders to purchase paid-up additions	53.42	
Dividends paid stockholders	40,000.00	
Decrease in unpaid dividends	546.31	
Increase in deferred dividends	10,512.36	
Increase in special credits or reserves to policyholders	7,565.49	
Surplus applied during the year		110,412.18
Divisible surplus, December 31, 1905		$477,360.61

State present basis of computation:

Mortality table or tables: Actuaries' and American.
Interest rate or rates: 4 and $3\frac{1}{2}$ per cent.

Policies in Force Less Than One Full Year.

Total expected death losses American Experience Table		$16,680.00
Total actual death losses incurred (not deducting reserves)		18,000.00
Total loading on first year's premiums collected		105,555.15
Total expenses chargeable first year:		
Commissions	$64,540.09	
Other expenses	48,799.02	
Total expenses		$113,339.11"

By Mr. Fyke (reading from report): Net premiums in Safety Fund Department in course of collection, \$146,000; net safety funds in Security Company, \$1,152,975.30. Balance taxed to the credit of members in Safety Fund Department, \$7,053.60; special reserve and surplus on Safety Fund policies, \$221,387.35.

By Mr. Fyke: Now, we offer sworn statement of this defendant of the condition of its business December 31, 1906, rendered
63 to the Insurance Department of the State of Missouri, in volume 38, page 635.

By Mr. Jones: We interpose the objection that it is irrelevant, immaterial and incompetent, as evidence in the case.

We object to that for the reason that it does not appear that any of these funds are funds concerned in the matter of controversy, or related in any manner to these contracts, and because whatever was in the safety fund could not in any wise affect the defendant's right to demand this assessment pleaded in the answer; and the same refers to the premium in course of collection; because the policy in this case was made for the purpose of creating, maintaining and re-creating a mortuary fund, within the limitation stated in the policy. For the reason that it is not alleged in the petition, nor in the reply, in this case that the company had any reserve for premiums in course of collection, or mortuary fund, or that any such funds or the funds in the safety fund account with the Trustee precluded the defendant from making the assessment; and the proof offered is not confined to the issues made by the pleadings, nor has the defendant had any notice by the pleadings that such proof would be offered. And because the report from which the figures are offered is a statement of the affairs of the company made to the Insurance Department of the State of Missouri, and the matters inquired about are not required to be set forth by law, and it is not shown that the statement is made within the knowledge—within the duties of the officer or agent who made them to the Insurance Department of Missouri.

By the Court: Objection overruled.

To which ruling of the Court the defendant then and there excepted and now excepts.

64 Said report for the year ending December 31, 1906, was in words and figures as follows:

"Hartford Life Insurance Company

Of Hartford, Conn.

(Commenced Business April, 1867.)

George E. Keeney, President. Charles H. Bacall, Secretary.

I. Capital Stock.

Amount of capital paid up in cash	$500,000.00		
Amount of ledger assets (as per balance) December 31, of previous year		$3,384,459.02	
Extended at			$3,384,459.02

II. Income.

First year's premiums on original policies without deduction for commissions or other expenses, less $70,365 for that year's reinsurance	$112,471.50	
Total first year's premiums on original policies	$112,471.50	
Dividends applied to purchase paid additions and annuities	22.26	
Surrender values applied to purchase paid-up insurance and annuities	16,174.00	
Total new premiums	$128,667.76	
Renewal premiums without deductions for commissions or other expenses, less $916.43 for reinsurance on renewals	1,997,368.24	
Dividends applied to pay renewal premiums	55,871.93	
Total renewal premiums	$2,053,240.17	
Total premium income		$2,181,907.93

Consideration for supplementary contracts not involving life contingencies ..		6,345.00	
Interest on mortgage loans	$34,189.44		
Interest on bonds and dividends on stocks..............	70,341.23		
Interest on premium notes, policy loans or liens.........	8,917.63		
Interest on deposits	6,419.65		
Interest on other debts due the company	3,539.56		
Rent from company's property, including $3,500 for company's occupancy of its own buildings..........	13,472.86		
Total interest and rents		136,880.37	
From other sources:			
Accident premiums less $209.85 for reinsurance........	$150.65		
Advance payments safety fund dept.	7,277.52		
		7,428.17	
Total income			$2,332,561.47

65 III. Disbursements.

For death claims, $1,579,666.82; additions, $994.47....	$1,580,661.29	
For matured endowments	1,000.00	
Net amount paid for losses and matured endowments		$1,581,661.29
Premium notes, voided by lapse..................................		286.77
Surrender values paid in cash		16,897.33
Surrender values applied to purchase paid-up insurance and annuities		16,174.00
Dividends paid to policyholders in cash..........................		47.56
Dividends applied to pay renewal premiums.......................		55,871.93
Dividends applied to purchase paid-up additions and annuities		22.26

Total paid policyholders, $1,670,961.14.)

Paid for claims on supplementary contracts not involving life contingencies		33.32
Paid stockholders for interest or dividends		40,000.00
Commissions and bonuses to agents (less commission on reinsurance), first year's premium, $72,779.99; renewal premium, $36,623.59; $2,623.74 of this amount bonus paid in lieu of rent for taking care of old business		109,403.58
Commuting renewal commissions		5,059.71
Salaries and allowances for agencies, including managers, agents and clerks.		24,724.88
Agency supervision, traveling, and all other agency expenses		9,746.61
Medical examiners' fees $8,242,51; inspection of risks, $4,315.25		12,557.76
Salaries and all other compensation of officers, directors, trustees and home office employes		87,091.59
Rent, including $3,500 for company's occupancy of its own buildings, received under sub-lease		9,365.43
Advertising, $7,311.48; printing and stationery, $5,824.25; postage, $7,693.23		20,828.96
Legal expenses		8,447.77
Insurance, taxes, licenses and department fees		26,001.41
Taxes on real estate		3,740.00
Repairs and expenses (other than taxes) on real estate		1,453.74
Losses on sale or maturity of ledger assets: Sale of Hocking Valley Ry. bonds, $112.50; U. S. of Mexico bonds (called), $2.42	$114.92	
All other disbursements:		
Directors' fees, $220.00; safety fund credits, $28,50	248.50	
Advance premiums applied, $8,408.13; accident com., $52.73	8,460.86	
Agents' bond premiums	329.72	
Tax on capital stock	2,628.00	
Fire insurance	1,070.92	

Office expenses	5,469.71		
Agents' balances charged off	2,495.89		
		20,703.60	
Total disbursements			$2,050,534.42
Balance			$3,666,486.07

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IV. Ledger Assets.

Book value of real estate, unincumbered	$218,781.00	
Mortgage loans on real estate, first liens	858,950.00	
Loans secured by pledge of bonds, stocks, or other collateral	50,000.00	
Loans made to policyholders on this company's policies assigned as collateral	120,937.96	
Premium notes on policies in force, for first year's premium	58,271.09	
Book value of bonds (excluding interest), $576,633.25; stocks, $139,468.08	716,101.33	
Deposited in trust companies and banks on interest	395,275.14	
Cash in company's office, $8,871.65; deposited in banks (not on interest), $22,552.65	31,424.30	
Agents' balances	20,534.17	
Safety funds in Security Company of Hartford	1,200,954.06	
Total	$3,671,229.05	
Less $4,742.98 unexpended fire indemnity	4,742.98	
Total ledger assets, as per balance		$3,666,486.07

Non-ledger Assets.

Interest due, $717.39, and accrued, $18,998.38, on mortgages		$19,715.77	
Interest due, $230.00, and accrued, $18,542.72, on bonds and stocks		18,772.72	
Interest accrued on collateral loans		750.00	
Interest accrued on other assets		2,208.11	
Rents due on company's property or lease		987.21	
Total interest and rents due and accrued			42,433.81
Market value of real estate over book value			5,319.00
	New business.	Renewals.	
Gross premiums due and unreported on policies in force December 31, 1906	$812.64	$40,836.24	
Gross deferred premiums on policies in force December 31, 1906	6,620.66	66,635.56	
Totals	$7,433.30	$107,471.80	
Deduct loading	5,203.31	21,494.36	
Net amount of uncollected and deferred premiums	$2,229.99	$85,977.44	88,207.43
All other assets (give items and amounts), net premiums safety fund dept. in course of collection			119,500.00
Gross assets			$3,921,946.31

Deduct Assets Not Admitted.

Agents' debit balances	$21,065.86	
Book value of ledger assets over market value, viz: Safety fund dept., $85,484.07; stock dept., $7,680.78	93,164.85	
Total		114,230.71
Total admitted assets		$3,807,715.00

67 V. Liabilities.

Net present value of all the outstanding policies in force on the 31st day of December, 1906, as computed by the company, on the Actuaries' and American Tables of Mortality, with 4 and 3½ per cent interest	$1,173,415.00	
Same for reversionary additions	838.00	
Total	$1,174,253.00	
Deduct net value of risks of this company reinsured in other solvent companies	3,147.00	
Net reserve		$1,171,106.00
Present value of amounts not yet due on supplementary contracts not involving life contingencies		6,012.00
Claims for death losses due and unpaid	$166.67	
Claims for death losses in process of adjustment or adjusted and not due	38,702.00	
Claims for death losses which have been reported and no proofs received	94,727.75	
Claims for death losses and other policy claims resisted by the company	12,000.00	

Claims for death losses which have been reported and no proofs received ...	94,727.75	
Claims for death losses and other policy claims resisted by the company	12,000.00	
Total policy claims		145,596.42
Premiums paid in advance, including surrender values so applied		8,159.95
"Cost of Collection" on uncollected and deferred premiums, in excess of the loading thereon		743.33
Salaries, rents, offices, expenses, taxes, bills, accounts, bonuses, commissions, medical and legal fees due or accrued		2,000.00
Dividends or other profits due policyholders, including those contingent on payment of outstanding and deferred premiums		197.34
Dividends apportioned, payable to policyholders during 1907		2,730.56
Amounts set apart or provisionally ascertained or calculated or held awaiting apportionment upon deferred dividend policies (give amounts separately for years and classes); 5-year period policies, $2,569.60; 7-year period policies, $10,945.67; 10-year period policies, $9,817.95; 15-year period policies, $5,281.70; 20-year period policies and longer, $54,811.13 ...		83,426.05
Other liabilities:		
Net safety funds		1,130,158.70
Balance of taxes to credit of members' safety fund dept.		7,444.87
Special reserve and surplus on certain policies, safety fund dept.		247,355.23
Capital stock		500,000.00
Unassigned funds (surplus)		502,785.15
Total liabilities		$3,807,715.60

Exhibit of Policies.

Including Paid For Business Only.

The following is a correct statement of the business of the year on policy accounts as it stood at close of business, December 31:

Classification.	1. Whole life policies. No.	1. Whole life policies. Amount.	2. Endowment policies. No.	2. Endowment policies. Amount.	3. Term and other policies including return premium additions. No.	3. Term and other policies including return premium additions. Amount.	4. Additions to policies by dividends. Amount.	5. Total Nos. and amounts. No.	5. Total Nos. and amounts. Amount.
At end of previous year	3,537	$4,996,266	4,459	$6,488,173	26,546	$48,320,082	$980	34,542	$59,805,501
Issued during year	512	768,162	1,186	1,649,130	405	765,631	......	2,103	3,182,923
Revived during year	78	156,643	199	351,228	120	258,528	......	397	766,399
Increased during year	....	19,357	....	....	.....	22,444	22	.....	41,823
Totals before transfers	4,127	$5,940,428	5,844	$8,488,531	27,071	$49,366,685	......	.....	....
Transfers, deductions	8	$19,000	21	$30,500	18	$23,000	......	.....	....
Transfers, additions	17	28,500	24	33,500	6	10,500	......	.....	....
Balance of transfers	9	$9,500	3	$3,000	12	$12,500	......	.....	....
Total after transfers	4,136	$5,949,928	5,847	$8,491,531	27,059	$49,354,185	$1,002	37,042	$63,796,646
Deduct ceased:									
By death	31	44,868	40	$75,091	683	$1,407,615	......	754	$1,527,574
By maturity	....	....	1	1,000	.....	....	......	1	1,000
By expiry	....	....	....	....	60	79,300	......	60	79,300
By surrender	9	5,347	25	34,349	.....	....	......	34	39,696
By lapse	501	714,248	829	1,190,897	1,658	2,647,677	......	2,988	4,552,822
By decrease	....	167,186	....	282,247	.....	96,136	......	.....	545,569
Total terminated	541	$931,649	895	$1,583,584	2,401	$4,230,728	......	3,837	$6,745,961
Outstanding end of year	3,595	$5,018,279	4,952	$6,907,947	24,658	$45,123,457	$1,002	33,205	$57,050,685
Policies reinsured	3	$24,393	....	....	11	$66,288	......	14	$90,681

Premium Note Account.

Premium notes, loans or liens on hand December 31 of previous year	$61,003.29	
Received during the year, on old policies	2,650.49	
Restored by revival of policies	415.16	
Total		$64,068.94
Deductions during the year as follows:		
Used in payment of losses and claims	$411.72	
Used in purchase of surrendered policies	2,968.07	
Voided by lapse	310.89	
Redeemed by maker in cash	2,107.17	
Total reduction of premium note account		5,797.85
Balance of note assets at end of year		$58,271.09

Business in Missouri During 1906.

	No.	Amount.
Policies on the lives of citizens of said State in force December 31 of previous year...	1,993	$39,629.55
Policies on the lives of citizens of said State issued during the year	231	4,136.48
Total	2,224	$43,766.03
Deduct ceased to be in force during the year	193	3,645.19
Policies in force, December 31	2,031	$40,120.84

	No.	Amount.
Losses and claims unpaid December 31 of previous year	8.	$18,000.00
Losses and claims incurred during the year	52	119,710.00
Total	60	$137,710.00
Losses and claims settled during the year	57	130,710.00
Losses and claims unpaid December 31	3	$7,000.00
Premiums collected or secured in cash and notes or credits without any deduction for losses, dividends, commissions or other expenses		$158,392.88"

By Mr. Fyke (reading from report): Net premium Safety Fund Department in course of collection, $119,500; net safety funds, $1,130,158.70; balance taxed to the credit of members, Safety Fund Department, $7,444.87; special reserve and surplus on certain policies, Safety Fund Department, $247,355.23.

By Mr. Jones: We want also to object to such parts of these reports as relate to the item of taxes paid, for the reason that the
70 policy expressly provides that each member shall be charged with the taxes imposed by the State where he resides.

This objection was overruled by the Court, and the defendant then and there excepted and now excepts.

The plaintiff offered in evidence only such specific items contained in the several reports to the Insurance Commissioner as relate to the Safety Fund Department. The bill of exceptions embraces the whole of such reports.

It is agreed that neither party will make any point that the entire reports (instead of only the specific parts referred to) are included in the record.

Plaintiff rests.

Defendant, to sustain the issues upon its part, offered the following testimony:

At the close of plaintiff's case defendant asked the Court to give to the jury the following instruction:

"The Court instructs the jury that under the law and the evidence their verdict must be in favor of the defendant."

Which said instruction was by the Court refused.

To which action of the Court, in so refusing said instruction, the defendant then and there excepted and now excepts.

By Mr. Jones: I offer now the deposition of George E. Keeney, President of Hartford Life Insurance Company.

It was stipulated that the copies of original papers attached to this deposition might be used with the same force and effect as originals.
71 Said deposition was as follows:

"George E. Keeney sworn.

Examined by Mr. Jones:

Q. Please state your full name.
A. George E. Keeney.
Q. Where do you reside?
A. My home is in Somers, Connecticut.
Q. What is your age?
A. 59.
Q. Are you the President of the Hartford Life Insurance Company?
A. I am.

Q. And have been such for how long?
A. Since 1899.

Objection of Peyton Parks on behalf of plaintiff, Nannie M. Johnson. Plaintiff objects to the testimony of the witness in this case for the reason that the party to the contract sued upon is dead and that the officer or agent of the defendant is not a competent witness to testify in this cause."

By Mr. Parks: We object to the competency of the witness in this case, for the reason that the party to the contract sued on is dead, and that the plaintiff (witness) is shown to be the president and agent of the defendant, having in charge the transaction of its business, and on that account is incompetent to testify by reason of the death of the assured, or deceased, James T. Johnson.

By the Court: He is not testifying as to any personal controversy; it is just upon the record that he is testifying.

By Mr. Parks: He is testifying to the conduct of its business and what was done about sending these notices and making the calls and the transaction of business, generally, I suppose.

72 By the Court: As to the transaction of business—now the sending of the calls—whether that is record or not; I am inclined to think the objection ought to be overruled. Objection overruled.

To which ruling of the Court plaintiff excepts.

George E. Keeney's deposition continued as follows:

"Who is the secretary of the company?
A. Thomas F. Lawrence.
Q. For how long has he been secretary?
A. Since September, 1907.
Q. Prior to that time who was the Secretary of the Company?
A. Charles H. Bacall.
Q. And he had been Secretary of the Company for a great many years, had he not?
A. I think since 1897.
Q. Was he connected with the Company prior to 1897?
A. No, sir.
Q. Where is Mr. Bacall now?
A. Mr. Bacall is dead.
Q. When did he die?
A. Early in 1907.
Q. General, please examine the paper which I now show you and state whether it is a copy of the charter of the Hartford Life Insurance Company?
A. It is, yes, sir.
Q. And of the several amendments thereto by the Legislature of the State of Connecticut?
A. Those amendments to the charter were made at different times. (Paper referred to, being copy of charter and amendments, is hereto attached and marked Exhibit 1. It being stipulated by

the parties at the time that no objection thereto would be made because of form of certification, or because the same was a copy and not the original of said document, and that same may be used in the trial of said causes by either party without certification)".

73 By Mr. Jones: Defendant introduces the charter of the defendant Company, Exhibit No. 1, attached to deposition, in evidence. The material thing in the Charter I call to your Honor's attention is this:

"Section Six. Said corporation may insure persons against and make all and every insurance connected with accidental loss of life, or personal injury sustained by accident, of every description, on such terms and conditions and for such periods of time, and confined to such countries and such persons as shall be from time to time ordered and provided for by the By-Laws of said corporation, and may make insurance based upon the lives of persons, and may make contracts upon any and all conditions appertaining to or connected with life risks."

Said Charter was in words and figures as follows:

DEFENDANT'S EXHIBIT NO. 1.

Chas. A. Safford, Notary Public.

Charter of the Hartford Life and Annuity Insurance Company.

At a General Assembly of the State of Connecticut, Holden at New Haven, in said State, on the first Wednesday of May, in the year of our Lord One Thousand Eight Hundred and Sixty-Six.

Incorporating the Hartford Accident Insurance Company.

Resolved by the Assembly:—

Sec. 1. That D. F. Seymour, Charles H. Northam, E. N. Kellogg, etc., and all such persons as hereafter may become duly associated with them as stockholders, their successors and assigns forever, be, and they are hereby constituted a body corporate and politic, by the name of the "Hartford Accident Insurance Company," * * *

Sec. 2. The capital stock of said corporation shall be not less than two hundred thousand dollars, and at any time hereafter may be increased by said corporation to any sum not exceeding one million dollars, and shall be divided into shares of one hundred dollars each; * * *

Sec. 6. Said corporation may insure persons against and make all and every insurance connected with accidental loss of life, or personal injury sustained by accident of every description, on such terms and conditions and for such periods of time, and confined to such countries and such persons as shall be from time to time ordered and provided for by the by-laws of said corporation; and may make insurance based upon the lives of persons, and may make con-

tracts upon any and all conditions appertaining to or connected with life risks; and suits at law may be maintained by any stock-
74 holder or person insured by said Company against said corporation, for losses or injuries insured against by said Company, in accordance with the terms of the contract of insurance and the form of the policies issued by said Company, if payment shall be withheld for more than thirty days after the same shall be and become payable by the terms of the policy of insurance or other contract, and after said corporation shall have been duly notified of such loss or injury; and said policies of insurance and all other contracts of said Company may be made with or without the common seal of said Company, and shall be binding and obligatory on said corporation according to the true intent and meaning of such policies or contracts. * * *

At a General Assembly of the State of Connecticut, Holden at Hartford, in said State, on the first Wednesday of May, in the year of our Lord One Thousand Eight Hundred and Sixty-seven:—

Amending the Charter of the Hartford Accident Insurance Company.

Upon the petition of the Hartford Accident Insurance Company, of Hartford:

Resolved by this Assembly:—

Sec. 1. That the name of said Company be, and the same hereby is, changed to that of the Hartford Life and Accident Insurance Company.

* * * * * * *

Sec. 6. It shall be the duty of said company to reserve out of its receipts an amount sufficient to re-insure all its outstanding life-risks of whatever description, other than mere accident risks said amount to be computed upon an assumption of mortality at the rates known as the "Actuaries'" or "Combined Experience" rates, and at a rate of interest of not less than four per cent nor more than five per cent per annum, as the directors shall from time to time determine; and such reserve shall be exempt from any liability for losses or claims arising from any general accident policy or contract insuring against death or disability caused by accident; and no dividend or interest shall be paid to either stockholders or policy-holders by which payment said reserve would be reduced below the minimum amount required by the provisions hereof. Provided, that nothing herein shall be construed to exempt the capital stock of the Company from liability for all its contracts.

Approved May 22d, 1867.

At a General Assembly of the State of Connecticut, Holden at New Haven, in said State, on the first Wednesday of May, in the year of our Lord One Thousand Eight Hundred and Sixty-Eight:—

Amending the Charter of the Hartford Life and Accident Insurance Company.

Upon the petition of The Hartford Life and Accident Insurance Company, of Hartford:

Resolved by this Assembly:—

Sec. 1. That the name of said Company be, and the same hereby is, changed to that of the Hartford Life and Annuity Insurance Company.

* * * * * * *

At a General Assembly of the State of Connecticut, Holden at Hartford, in said State, on the Wednesday after the first Monday in January, in the year of our Lord One Thousand Eight Hundred and Seventy-Nine:—

Authorizing a Reduction of the Capital Stock of the Hartford Life and Annuity Insurance Company.

Resolved by this Assembly:—

That the Hartford Life and Annuity Insurance Company, Hartford, Connecticut, be, and they hereby are, authorized to re-
75 duce their Capital Stock from the sum of three hundred thousand dollars to an amount not less than two hundred and fifty thousand dollars.

At a General Assembly of the State of Connecticut, holden at Hartford, in said State, on the Wednesday after the first Monday in January, in the year of our Lord One Thousand Eight Hundred and Eighty-Two:

Amending the Charter of the Hartford Life and Annuity Insurance Company.

Resolved by this Assembly:

That section six of an amendment to the charter of the Hartford Life and Annuity Insurance Company, approved May twenty-second, 1867, shall be and hereby is amended to read as follows:

Section 6. It shall be the duty of said company to reserve out of its receipts an amount sufficient to re-insure all its outstanding life risks of whatever description other than mere accident risks, and other than such contracts as it has made or may make wherein the sum payable upon the death of the person named in any such contract is made contingent upon an assessment collected from the associated holders of such contracts, said amount to be computed upon

an assumption of mortality at the rates known as the actuaries' or combined experience rates, and at a rate of interest of four per cent per annum; and such reserve shall be exempt from any liability for losses or claims arising from any general accident policy or contract insuring against death or disability caused by accident, and no dividend or interest shall be paid to either stockholders or policy-holders by which payment said reserve would be reduced below the minimum amount required by the provisions hereof; provided, that the capital stock of the company shall be liable for all its contracts without exemption by reason of anything herein contained.

Approved April 25, 1882.

At a General Assembly of the State of Connecticut, holden at Hartford, in said State, on the Wednesday after the first Monday in January, in the year of our Lord One Thousand Eight Hundred and Ninety-Seven:

Changing the Name of the Hartford Life and Annuity Insurance Company to the Hartford Life Insurance Company.

Resolved by this Assembly:

Section 1. That the corporate name of the Hartford Life and Annuity Insurance Company, a corporation located and doing a life insurance business in Hartford, in this State, be and the same is hereby changed to The Hartford Life Insurance Company, by which name it shall be hereafter known and called.

Section 2. All contracts, rights, obligations, property, privileges and franchises of the said Hartford Life and Annuity Insurance Company shall be and remain unimpaired and vested in the corporation under its new name.

Approved March 3, 1897. Adopted May 11, 1897.

At a General Assembly of the State of Connecticut, holden at Hartford, in said State, on the Wednesday after the first Monday in January, in the year of our Lord One Thousand Nine Hundred and Three:

Amending the Charter of the Hartford Life Insurance Company.

Resolved by this Assembly:

Section 1. That The Hartford Life Insurance Company is hereby authorized to insure persons against loss of time and expense resulting from disease.

76 Section 2. This resolution shall take effect when approved by a majority vote of the stockholders of said Company, and a certified copy of said vote of approval shall be lodged on file in the office of the Secretary of the State.

Approved May 12, 1903.

GEORGE E. KEENEY's deposition continued as follows:

"Q. I call your attention to the following portions of the charter, section 6 of the original charter, which reads: 'And may make insurance based upon the lives of persons, and may make contracts upon any and all conditions appertaining to or connected with life risks.' I also call your attention to section 6 of the amendment, May 22, 1867, relating to the duty of the company to reserve out of its receipts 'an amount sufficient to re-insure all its outstanding life risks,' etc., and to the amendment of April 25, 1882, section 6, which provides as follows: 'It shall be the duty of said company to reserve out of its receipts an amount sufficient to reinsure all its outstanding life risks of whatever description other than mere accident risks, and other than such contracts as it has made or may make wherein the sum payable upon the death of the person named in any such contract is made contingent upon an assessment collected from the associated holders of such contracts,' and ask you to state whether the Hartford Life Insurance Company has written both legal reserve or level premium contracts, and whether it has written assessment contracts, also, wherein, speaking generally, the sum payable upon the death of the holder of the contract is made contingent upon assessments collected from associated holders of such contracts.

A. We have.

Q. Please examine the paper which I now hand you and state what that paper is.

A. That is a certificate of membership in the Safety Fund Department of an edition published in August, 1888.

77 Q. It purports to be and is a copy of the certificate issued to Dr. James T. Johnson, is it not?

A. It is.

Q. Now, the date of that certificate is what?

A. The first day of November, 1888.

Q. Mr. Rosenberger would like to know the date of the issue of that form of certificate?

A. August, 1888.

Q. Attached to that certificate is what, on the third page?

A. That is the Trustees' contract between the Hartford Life and Annuity Insurance Company and the Security Company for the care of the Safety Fund as accumulated by the Safety Fund members.

(That paper is hereto attached and marked Exhibit 2.)"

Said Exhibit 2 is as follows:

DEFENDANT'S EXHIBIT No. 2.

Chas. A. Safford, Notary Public.

No. 109854. Age 52.

The Hartford Life and Annuity Insurance Company, Hartford, Connecticut.

Policy—Safety Fund Department. Amount—$5,000.

In consideration of the representations, agreements, and warranties made in the application herefor, and of the Admission Fee paid; and of Three Dollars per annum on each $1,000 of the Indemnity herein provided for, for expense Dues, to be paid as hereinafter conditioned, and of the further payment of all Mortality Calls proportioned to the said Indemnity, levied against the herein named member to form a Mortuary Fund for the payment of all Indemnity matured by deaths of members, and to create a Safety Fund as hereinafter described, which mortality calls, to be levied upon all the members in the department wherein this Certificate is issued whose Certificates are in force at the dates of such deaths, shall be made according to the table of graduated mortality ratios given hereon, and as further determined by their respective ages and the aggregate Indemnity at the dates of such deaths, with due allowance for discontinuance of membership (one-third of the proceeds of such mortality calls to be applied towards said Safety Fund until the sum of ten dollars on each $1,000 Indemnity aforesaid shall have been thus applied, when the basis of all subsequent mortality calls shall be two-thirds only of the table given hereon), does hereby issue this Certificate of Membership in its Safety Fund Department to James T. Johnson (herein called the member), of Clinton, County of Henry, State of Missouri, with the following agreements:

That ninety days from the receipt by the President or Secretary of said Company of satisfactory proofs, in accordance with
78 forms furnished upon notice of death and with full information as to the manner and cause of the death of the herein named member while this Certificate is in force, all the conditions hereof having been conformed to by the member, upon presentation and surrender of this Certificate properly receipted, there shall be due and payable, out of the aforesaid Mortuary Fund and not otherwise, the Indemnity of Five Thousand Dollars (less the balance unpaid, if any, of the stipulated contribution to said Safety Fund, with fifty per cent added, together with the unpaid installments of annual expense dues and any mortality or other charge against the member, payment of which is not matured) to his wife, Nannie M. Johnson, if living; otherwise to his legal representatives. All such payments

to be made at the Home Office of said Company in lawful money of the United States.

That said Company will deposit said sum of Ten Dollars, when received, with the Trustee, named in a contract made with it (of which a copy is printed hereon), as a Safety Fund in trust for the uses and purposes expressed in said contract; and shall make a semi-annual division of the net interest received therefrom by it, pro rata among all the holders of Certificates in force in said Department at such times, who shall have contributed five years prior to the date of any such division their stipulated proportion of said Fund, by applying the same to the payment of their future dues and assessments; and that, whenever said Fund shall amount to One Million Dollars, all subsequent receipts therefor shall be divided by the said Company in like manner as the interest. Said Company further agrees that if at any time it shall fail by reason of insufficient membership, or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any Certificate issued in said Department, and such Certificate shall be presented for payment to said Trustee by the legal holder thereof, accompanied by satisfactory evidence, as hereinafter provided, of its failure to pay, after demand upon it within the time herein stipulated for limitation of action, then it shall be the duty of said Trustee to at once convert said Safety Fund into money and divide the same (less the reasonable charges and expenses for the management and control of said Fund) among the holders of Certificates then in force in said Department, or their legal representatives, in the proportion which the amount of each of their Certificates shall bear to the amount of the whole number of such Certificates in force; and that in such event it shall file with said Trustee a correct list, under oath, of the names, residences and amounts of the Certificates of all members entitled to participate in such division. The evidence referred to above to be either certification of said Insurance Company's President or Secretary that a claim is justly and legally due and that payment thereof has been demanded and refused, or the duly attested copy of a final judgment obtained thereupon in any court of competent jurisdiction, satisfaction of which has been neglected or refused for the period of sixty days from its date.

And said Company further agrees that so long as any Certificate of Membership in its Safety Fund Department shall remain in force, said Fund shall be in no wise chargeable or liable for any use or purpose except as above mentioned.

And said Company further agrees that the aforesaid Mortuary Fund shall be in no wise chargeable or liable for any use or purposes other than for the settlement of Death Claims, except as herein mentioned.

79 This certificate is issued by the company and accepted by the member upon the express conditions and agreements given elsewhere hereon, and assented to as forming part of this contract.

In witness whereof, the said Hartford Life and Annuity Insurance Company have, by their President and Secretary, signed and delivered this contract, at Hartford, Conn., this 1st say of November, one thousand eight hundred and 88.

W. R. FOSTER, *President.*

[SEAL.] W. R. COALES,
Asst. Secretary.

Agents of the Company are not authorized to make any indorsements on or to vary the terms of this Certificate.

(Ed. Aug., '88.) (Fund payable with M. C.)

Condition No. 2, "Of Payments," will be so far modified by notices as to allow four days' grace; Increased to fourteen days if resident west of Rocky Mountains.

Annexed is a copy of the Application upon which this Contract is based. Particular attention is invited to it, as this Certificate is issued on the faith of the answers and agreements therein made, which if not correct render it invalid.

This Certificate is issued by the Company and accepted by the member upon the following express conditions and agreements:

1. Application Made Part of Contract.—The application on the faith of which this Certificate issues, together with each and all the several answers, statements, agreements and verification therein contained, is hereby referred to and made a part of this contract; and the exact literal truth of every representation contained in such application as also in each application for reinstatement of this contract shall be a condition precedent to the validity of this contract and of each reinstatement thereof granted in consideration of such representations.

2. Of Payments.—The member agrees to pay to said Company, for expenses, dues of Three Dollars per annum on each $1,000 Indemnity on the first day of the month after date of issue hereof, and at every anniversary thereafter, so long as this Certificate shall remain in force; or by pro rata installments of the same, in advance, for periods of less than a year: And also agrees to pay said Company, within thirty days from day on which notices bear date, all Mortality Calls determined as within set forth; the proceeds of which, less such charges as are herein prescribed and ten cents on each Call for cost of collection and less also one-third of each Mortality Call until the sum of Ten Dollars on each $1,000 Indemnity has been paid and applied to the within described Safety Fund, shall form the Mortuary Fund: But if the laws of any country, state, county or municipality shall require a tax to be paid by said Company on account of such payments, then the mortality calls hereon shall be determined so as to cover such tax; and the proceeds of such mortality calls shall be charged with the member's proportionate share of fees actually paid by the Company for medical examinations made in the first year of the membership hereby granted. All of which payments are to be made directly to the Home Office of said Company, and not to agents, who are unauthorized to receive them.

3. Conditions of Acceptance.—The member further agrees and accepts this Certificate upon the express condition that if either the Annual Dues, Mortality Calls, or Safety Fund Deposit, as hereinbefore required, are not paid to said Company on the day due,
80 then this Certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the Certificate was in force, either from said Company or the Trustee of the Safety Fund: And that failure to make the stipulated payments shall absolutely terminate the member's liability therefor: And that if any final division from said Safety Fund, as hereinbefore provided, shall be made by the Trustee thereof on account of this Certificate; then, and in all such cases all liability of said Company and of its Safety Fund, on account of this Certificate, shall cease.

4. Incontestability of Contract.—Five years from the date of full payment hereon towards the Safety Fund, or five years from the date of any reinstatement hereof after such full payment, this contract shall be absolutely incontestable, provided that no default in respect of time and amount of any of the stipulated payments hereon shall have occurred (excluding all waiver whatsoever of promptness in payment unless evidenced by extension of time by the Company's Secretary in writing): Provided also that no understatement of age was made in application herefor; except that in case of such understatement the indemnity recoverable shall nevertheless be such a proportional part only of the whole indemnity named herein as the whole amount of mortality calls paid hereon shall bear to the whole amount of same that should have been paid at the true age; and except further that if the true age at date of application was beyond the age of sixty years then there shall be recoverable only the annual dues and mortality calls paid hereon: And provided further that the occupations prohibited herein shall not be followed without the Secretary's written consent.

5. Giving Notice.—The quarter days for the payment of Mortality Calls shall be the 1st day of March, June, September and December in each year, notices of which will be dated and mailed thirty days before such dates. No Mortality Call to fall due on the first quarter day following the date of this contract can be made. A notice directed to the address of the member, or other person designated by the member, appearing at the time on the Company's books, shall be a sufficient notice of any required payment, and a certificate of the Secretary, supported by affidavit of the person whose duty it was to perform the service, of such addressing and of mailing of notice in post office at Hartford shall be taken and admitted as conclusive evidence of such addressing and mailing and be admitted as conclusive proof of due notice to each and every person interested herein: But if the person addressed as aforesaid shall fail to receive a notice of Mortality Call before the 15th day of February, May, August and November in each year, nevertheless this contract shall not discontinue if an amount equal to the amount of the last paid Mortality Call be transmitted to and received by the Company's Secretary on or before the Fifth day of the Calendar month next follow-

ing the month in which the aforesaid failure of notice shall have occurred. (If failure of notice of first mortality call occurs, then compute for such purpose an amount, for each $1,000 Indemnity, equal to twice the ratio set in the table hereon against the member's age.) Notices given while any payment that has fallen due hereon shall be unpaid, are to be understood only as notices to reinstate membership and shall not be held to extend maturity of such unpaid payments nor as waiving proof that the member is alive and in good health, certificate of which shall be tendered with all applications for
81 reinstatement; nor shall payments therefor be effective to reinstate membership unless they, together with such health certificate to the Company's satisfaction, shall be received at the Company's Home Office before the member's death.

6. Change of Residence or Address.—In case of change of residence, post-office address, occupation, or name of the member, or other person designated to be notified by Company, the member or such person shall at once give notice thereof in writing to the Secretary of the Company. In case of failure to do so, the Company may proceed for all purposes as if no such change had been made.

7. Prohibitions.—If the member shall be personally engaged in blasting, submarine operations, mining underground, manufacturing poisonous or explosive chemicals, retailing intoxicating beverages, as engineer or fireman on railroad locomotive, or in "braking" or "coupling" on, and "making up" of railroad trains, trading or living among savage tribes or nations, or shall be engaged in military service (except in time of peace), or in naval or any marine service, without, in each of these cases, having first obtained the written consent of said Company's Secretary, or shall use alcoholic or narcotic stimulants so as to produce intoxication sufficient to impair health, or to produce delirium tremens, or to cause death; or shall die by self-destruction—whether sane or insane—or while intoxicated, or from effects of drunkenness, or as the result of a duel, or in consequence of keeping or visiting unlawful or disreputable resorts, or while violating or attempting to violate the laws of any nation, state, province or municipality; or if there has been any concealment, misrepresentation or false statement or statement not true made in the application on which this Certificate issues; or if the conditions of this Certificate shall not be in all respects observed and performed by the member to whom this Certificate issues; then, and in all such cases, this Certificate shall be null and void, and of no effect, and no person shall be entitled to damages, or the recovery of any moneys paid hereon.

8. Travel and Residence.—The member herein named is at liberty to travel by railroad, sea, lake, or river, by all trains, first-class steamers and sailing vessels, and to visit or reside, in addition to the residence named in the application herefor, in any portion of the world where inhabited and civilized, and free from epidemics, wars, or internal dissensions.

9. Limitation of Action.—It is expressly understood and agreed that no action shall be maintained, nor recovery had, for any claim upon or by virtue of this Certificate, after the lapse of one year

from the death of said member; and if no suit or proceedings for such recovery be commenced within one year from the date of death of said member, it shall be deemed a waiver, on the part of all parties concerned, of all rights or claims under or by virtue of this Certificate, and as conclusive evidence against the validity of such claim, and this Certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid hereon. And it is further expressly agreed, in case any suit or proceeding shall be commenced for the recovery of any claim under this Certificate after the lapse of one year from the death of said member, that the person or persons so commencing suit or proceeding shall pay to said Company the sum of two hundred dollars as its reasonable attorney fees and damages, in addition to the taxable costs and allowances in the case.

82 10. Debts and Liens.—It is further agreed that this Certificate shall be charged with any and all amounts that may be owing from the member or beneficiary herein, or their assigns, to said Company at the time of the payment of this Certificate, and the Company reserves a lien thereon to secure the payment of any such indebtedness, and the right to deduct and withhold the amount of any such account or indebtedness in payment thereof. But nothing herein contained shall be held to constitute a waiver of forfeiture if any of the hereinbefore stipulated payments shall not be paid when due in the manner set forth in the conditions of this Certificate.

11. Assignments.—This Certificate shall not be assigned or transferred, unless with the concurrent action of the member and beneficiary or beneficiaries, assignee or assignees hereunder; nor unless with the consent in writing of said Company's Secretary and immediately filing with him a copy of all such assignments or transfers; nor, unless a claim hereunder, made by an assignee, be subject to proof of interest; nor, unless the amount recoverable hereunder by any such assignee (except such assignee shall bear to the member the relationship of wife, child, parent, brother or sister) be limited to the value of the interest proven. The Company shall not be responsible for validity of assignments.

12. Powers of Agents.—Agents of the Company cannot alter or waive any of the conditions of this Certificate, nor issue permits of any kind, and they are not authorized to make any indorsements hereon, nor to receive or receipt for money on behalf of this Company other than for Admission Fees, for the receipt of which alone the delivery of this Certificate is acknowledgment. It is further expressly agreed that if the member shall entrust money to an agent for payment of Mortality Calls, Dues or Safety Fund Deposits the Company shall not be held responsible therefor until all moneys thus entrusted shall have been actually received in the Home Office of the Company before the last day fixed for payment of such moneys shall have passed.

13. Waiver of Conditions.—Alteration of the conditions of this Certificate or waiver of forfeiture thereof shall not be effective

unless made in writing, signed by the Company's President or Secretary.

14. This contract shall not go into effect until delivered to the member or designated beneficiary within the lifetime and good health of the member, nor if delivered while any part of the payments required by its terms shall be past due and unpaid at the Company's Home Office.

Trustees' Contract.

This agreement, made and entered into this Thirty-first day of December, A. D. 1879, by and between the Hartford Life and Annuity Insurance Company, a corporation organized under the laws of the State of Connecticut, and located in the City of Hartford in said State, party of the first part; and the Security Company, a like corporation, also located at said Hartford, party of the second part; Witnesseth:

Whereas, The party of the first part purposes to issue to persons contracting therefor, Certificates of membership in a special department of its business to be known as the Safety Fund Department, and, in consideration of the sum of ten dollars to be received on each one thousand dollars of the amount of each and
83 every such Certificate for the purpose of creating a Safety Fund, to insert therein sundry agreements with such persons in the following words, to-wit:

"That said Company will deposit said sum of ten dollars, when" "received, with the Trustee, named in a contract made with it (of" "which a copy is printed hereon), as a Safety Fund in trust for" "the uses and purposes expressed in said contract; and shall at the" "expiration of five years from July 1, 1879, if said Safety Fund" "shall then amount to three hundred thousand dollars, or whenever" "thereafter said sum shall be attained, make a semi-annual division" "of the net interest received therefrom by it, pro rata among all" "the holders of Certificates in force in said department at such" "times, who shall have contributed five years prior to the date of" "any such division their stipulated proportion of said Fund, by" "applying the same to the payment of their future dues and assess-" "ments; and that, whenever said Fund shall amount to one million" "dollars, all subsequent receipts therefor shall be divided by the" "said Company in like manner as the interest."

"Said Company further agrees that if at any time, after said" "Fund shall have amounted to three hundred thousand dollars, or" "after five years from January 1, 1880, if that amount shall not" "have been attained before that date, it shall fail by reason of" "insufficient membership, or shall neglect if justly and legally due," "to pay the maximum indemnity provided for by the terms of any" "Certificate issued in said department, and such Certificate shall" "be presented for payment to said Trustee by the legal holder" "thereof, accompanied by satisfactory evidence, as hereinafter" "provided, of its failure to pay, after demand upon it within the" "time herein stipulated for limitation of action, then it shall be"

" the duty of said Trustee to at once convert said Safety Fund into "
" money and divide the same (less the reasonable charges and "
" expenses for the management and control of said Fund) among "
" all the holders of Certificates then in force in said department, or "
" their legal representatives, in the proportion which the amount of "
" each of their Certificates shall bear to the amount of the whole "
" number of such Certificates in force; and that in such event it "
" shall file with said Trustee a correct list, under oath, of the names, "
" residences and amounts of the Certificates of all members entitled "
" to participate in such division. The evidence referred to above "
" to be either certification by said Insurance Company's President or "
" Secretary that a claim is justly and legally due, and that payment "
" thereof has been demanded and refused, or the duly attested copy "
" of a final judgment obtained thereupon in any court of competent "
" jurisdiction, satisfaction of which has been neglected or refused "
" for the period of sixty days from its date."

" And said Company further agrees that so long as any Cer- "
" tificate of membership in its Safety Fund Department shall re- "
" main in force, said Fund shall be in no wise chargeable or liable "
" for any use or purpose except as above mentioned."

Now, therefore, the party of the first part, in consideration of the covenants and agreements hereinafter contained on the part of the party of the second part and in accordance with its agreement with its Certificate holders as hereinbefore recited, does hereby appoint the party of the second part Trustee as aforesaid and covenants and agrees with it and its successors in said trust to deposit with said Trustee, as soon as received, the sum of ten dollars on each thousand dollars of the amount of each and every Certificate of membership issued by it in the aforesaid department until said Fund shall
84 amount to one million dollars, to be by said Trustee held in trust and accumulated as hereinafter agreed, and the income thereof, less the reasonable compensation and expenses of said trust, to be paid over to the party of the first part, as hereinafter provided, to be used by the party of the first part in accordance with the hereinbefore recited agreements: And when said Trustee shall pay the income, as above, to the party of the first part, or shall make any other payments from said Fund, as required by the terms hereof, the liability of said Trustee on the amount so paid shall cease; it being understood and agreed that said Fund belongs to the party of the first part, subject to the expressed trusts herein provided.

And the party of the second part, for itself and its successors, in consideration of such deposits and of a reasonable compensation for its services and the necessary expenses of managing said trust, covenants and agrees with the party of the first part and its successors and with each of the holders of the aforesaid Certificates that it will receive, hold, manage and dispose of all said deposits made with it by said Insurance Company, principal and income, in accordance with the uses and purposes specified in the hereinbefore recited agreements of the party of the first part with its Certificate holders; and shall at all reasonable times exhibit to the party of the first

part all the securities and investments composing said Trust Fund; and shall render true statements of the account of said funds and the income thereof to any person entitled to request the same by reason of an interest therein; said party of the first part hereby agreeing to keep the party of the second part correctly informed of the names, addresses, numbers and amounts of Certificates of all persons thus entitled.

That, as often as the sum composing such Fund shall be in amount sufficient to purchase one thousand dollars, par value, of United States Bonds, said Trustee shall make investments of such funds therein and register the same in its name as Trustee of the Safety Fund of the said Insurance Company, and, provided no default by the party of the first part as hereinbefore recited shall occur, shall accumulate said Fund and the income thereof (less the reasonable compensation and expenses), for five years from July 1, 1879, or until such time thereafter as said Fund shall amount to three hundred thousand dollars, par value, of the bonds purchased for said Fund, when the party of the second part will pay over to the party of the first part, semi-annually thereafter, all the further income from said Fund (less the accruing and unpaid compensation and expenses), to be by the party of the first part used for the purposes mentioned in the hereinbefore recited agreements: And, unless such default shall occur, will thereafter add to the principal of said Fund the deposits thereafter received from the party of the first part, exclusive of the income therefrom, until the whole Fund shall amount in such bonds, at their par value, to one million dollars: And in the event of the failure or neglect mentioned in the hereinbefore recited agreements, will convert said Fund into money and divide the same in accordance with the hereinbefore recited agreements, as soon as can reasonably be done after the necessary information of the proper persons and their shares shall have been obtained: Said party of the first part hereby agreeing to put the party of the second part in possession of the information required for the making of a proper division thereof as agreed with its Certificate holders.

85 All payments required hereby to be made to the party of the first part to cease upon the aforesaid failure or neglect of the party of the first part; and all payments required herein to be made to the Certificate holders by the party of the second part to be made at the office of said Trustee or of the successor in said trust.

The necessary expenses connected with the management of said Fund shall be limited to the ordinary commissions for purchasing or selling and transfer or transmission of the hereinbefore mentioned bonds, together with the cost of the stationery and postage used in replying to requests for information of the condition of said Fund and the actual cost of any judicial action needed to determinate the legal status of said Fund: All other expense to be included in and covered by such reasonable charge as shall be made for the compensation of the trusteeship, to be determined by the amount of time and labor involved in the execution thereof.

It is hereby mutually understood and agreed by both parties hereto that all the hereinbefore recited agreements of the party of the first part with its Certificate holders shall constitute the uses and purposes of the trust expressed herein. And it is hereby further understood and agreed that at such time as it shall be shown that all Certificates of membership issued by the party of the first part in its Safety Fund Department, have been legally settled and surrendered to it, or properly canceled in accordance with their terms, it shall be held and considered that the uses and purposes of said trust have been fully accomplished by said Insurance Company, and the balance of said Fund, if any, shall be paid over to the party of the first part.

And it is further understood and agreed that if said party of the second part shall, for any cause, fail to perform its duties as such Trustee as hereinbefore specified, or if by reason of financial embarrassment of the party of the second part, or other cause, it shall be deemed expedient to remove said trust from its hands, then a new trustee may be appointed, by the mutual nomination of said Insurance Company, and the then Insurance Commissioner of the State of Connecticut, to succeed to said trust, with all the duties and obligations herein imposed upon said original Trustee, and said party of the second part shall surrender said Fund to such successor.

In witness whereof, the party of the first part has affixed hereto the corporate seal of said Insurance Company and caused these presents to be signed by its President and Secretary.

And the party of the second part has hereto affixed its corporate seal and its President and Treasurer have hereunto set their hands.

Done in duplicate at Hartford in the State of Connecticut the day and year first above written.

HARTFORD LIFE AND ANNUITY INS. CO.,
By E. H. CROSBY, *President*, AND
[SEAL.] STEPHEN BALL, *Secretary*.
SECURITY COMPANY,
By ROBERT E. DAY, *President*, AND
[SEAL.] WILLIAM L. MATSON, *Treasurer*.

86 The following appeared on the back of said policy:

Table of Graduated Mortality Ratios for Every $1,000 of Death Loss on Each $1,000 of a Total Indemnity in Force of $1,000,000.

Age.	Ratio.	Age.	Ratio	Age.	Ratio.	Age.	Ratio.
15 to 21	$0 98	33	$1 37	44	$1 80	55	$2 88
22	1 01	34	1 41	45	1 83	56	3 05
23	1 04	35	1 46	46	1 88	57	3 23
24	1 07	36	1 50	47	1 95	58	3 48
25	1 10	37	1 55	48	2 03	59	3 75
26	1 13	38	1 59	49	2 10	60	4 02
27	1 16	39	1 64	50	2 21	61	4 29
28	1 19	40	1 68	51	2 31	62	4 62
29	1 22	41	1 71	52	2 45	63	4 95
30	1 25	42	1 74	53	2 58	64	5 48
31	1 28	43	1 77	54	2 72	65	6 00
32	1 32						

The ratios decrease in proportion as the total indemnity in force increases above $1,000,000 in amount, and are calculated so as to cover the stipulated cost of collection, and Safety Fund Deposit.

By Mr. Jones: Mr. Parks, can it be stipulated of record that this Exhibit 2, witness is testifying to, is a copy of the policy sued on?

By Mr. Parks: I am satisfied that they are correct and if there should be any differences, it will be corrected. Unless corrected, it will be stipulated that he is testifying to the policy sued on.

George E. Keeney's deposition continued as follows:

Q. Do you personally know that the copy of the contract designated "trustees' contract" is a correct copy of the contract entered into between the defendant in these cases, the Hartford Life Insurance Company, at that time known as the Hartford Life and Annuity Insurance Company, and the Security Company, of date December 31, 1879?

A. I do.

Q. That form of certificate providing for the collection of assessments and with provisions relating to the creation and maintenance of a Safety Fund and the distribution of increment therefrom, is known and described in your business as what form of certificate?

87

A. Safety Fund certificates.

Q. When did you begin to issue those forms of certificates, known as Safety Fund certificates?

A. In 1880.

Q. And you continued to issue the Safety Fund certificates down to about what time?

A. 1899.

Q. Since that date, have there been but few of those certificates issued?

A. There have been none.

Q. Please state whether subsequent to 1880 the company issued certificates of membership which provided generally for either a fixed or level rate during a period of seven years, with a provision to the effect that after seven years the membership certificate so issued should become and go into the Safety Fund membership?

A. We did.

Q. Will you please examine the paper which I now hand you; state whether that is one of the so-called seven-year certificates?

A. It is.

Q. I call your attention to the first page of this certificate which recites that it is issued in consideration of a named amount—the blank being left in the certificate for the amount—"to be made at the date hereof, and of like payments to be made on the — day of —, in every successive year in the seven years then commencing, and of the subsequent payments to be made as required by the fourth condition hereof." And to the fourth clause of the certificate which appears on the second page and reads as follows: "The payments required under this policy for the first seven years shall be charged with two dollars annually (unless sooner commuted) for each
88 one thousand dollars of insurance, payable into the Safety
Fund referred to in condition 6 hereof, with the costs of collection, the due proportion of taxes levied hereon or in connection herewith, the expenses of investigations and adjusting death claims, first year's expenses and with dues proportioned annually at the rate of four dollars for each one thousand dollars of insurance, which dues shall be for the company's sole use in consideration of its paying all other expenses. From the balance of said payments, after making said charges, shall be paid the actual mortality occurring on policies written upon this form (designated herein as form 4) during their first seven years; and any excess, as determined by the company, remaining after payment of said mortality, shall be credited as a dividend upon the eighth and following years."—and ask you to state whether receipts from and payments to and on account of policies of this description were kept separate and distinct from the receipts and disbursements of the so-called Safety Fund members during the first seven years of the continuance of the certificate described as form 4, seven-year certificate, which form of certificate I will have the notary mark Exhibit No. 3?

A. They were.

(Said certificate marked Exhibit No. 3 and is hereto attached.)

By Mr. Jones: Exhibit No. 3, attached to deposition, is introduced in evidence.

89 Said Exhibit No. 3 is as follows:

EXHIBIT No. 3.

No. .. Age ..

The Hartford Life Insurance Company, Hartford, Connecticut,

In consideration of the agreements and warranties made in the application herefor, does hereby issue this Certificate of Membership and Policy of Insurance to............................ (herein called the member) of...................., County of ...., State of.................... And in further consideration of an advance payment of............. ..../100 Dollars, to be made at the date hereof, and of like payments to be made on the................ day of .... in every successive year in the seven years then commencing, and of the subsequent payments to be made as required by the fourth condition hereof, the said Company does hereby insure said member during his lifetime, subject to the following agreements:

That ninety days from the receipt by the Company's President or Secretary of satisfactory proofs of the manner and cause of the death of the member, executed as required by the forms furnished by the Company upon notice to it of said death, together with full report of any inquest, all the conditions hereof having been conformed to—upon surrender hereof (receipted to the Company's satisfaction), at its Home Office in Hartford, Conn., where all payments are to be made—there shall be due and payable, in lawful money of the United States, the indemnity of................ Dollars (less any unpaid balance of the Safety Fund mentioned in said fourth condition, and less any unpaid balance not yet due of the then current year's payments in case the same are made payable other than annually), to..........................
....
....
....
....
....
................................legal representatives, or to such other beneficiary as the member shall from time to time designate, with the written consent of the Company; and upon the express conditions and agreements given elsewhere hereon.

In Witness Whereof, The said Hartford Life Insurance Company has, by its President and Secretary, executed this contract, at Hartford, Conn., this.......... day of.................... one thousand eight hundred and ninety............

........................., *President.*

........................., *Secretary.*

Agents of the Company are not authorized to make any indorsements on or to vary the terms of this Contract.

Annexed is a copy of the Application upon which this Contract is based. Particular attention is invited to it, as this Certificate is issued on the faith of the answers and agreements therein made, which if not correct render it invalid.

Form 4, S. F. D.
(Ed. May, '97.)

90 Express Conditions and Agreements Forming Part of This Contract.

1. This contract shall take effect only when the herein stipulated first payment is made in cash, within the member's lifetime while in good health. The application herefor, and its verification, together with any application for reinstatement, are part of this contract. No alteration or waiver of any of the terms and conditions of said contract shall be valid unless made in writing and signed by the Company's President or Secretary. Agents are without power to bind the company in any manner whatsoever, or to receive moneys for transmission except upon production of a receipt for the same signed by the Company's President or Secretary. No action at law nor suit in equity shall be maintainable, or recovery had hereupon, unless commenced within one year from the date of death of the member; nor shall any act, or omission to act, of the Company serve to extend this limitation of action.

2. This contract shall not be assigned, except with the written consent of the Company's President or Secretary, nor unless the original assignment be at once filed in Company's Home Office. Nor (except the assignee hereof shall bear to the member the relationship of wife, husband, child, parent, brother, sister, dependent friend or business partner) shall the amount recoverable exceed the money value of the assignee's then interest as shown to exist by sworn statement rendered to the Company's satisfaction. The Company shall not be responsible for the validity of assignments.

3. In case of death caused by the member's own hand, whether sane or insane, or caused by, or while engaged in, violation of law or service in the Army or Navy of any government, by the member, the indemnity payable shall be reduced to a sum equal to the amount actually paid to the Company hereon. After three years from date hereof, this contract shall be incontestable, at the maximum indemnity herein named, unless for fraud, default in payments as and when stipulated, and for understatement of age in said application; provided, however, that if the true age was within the age of sixty years at date of application, then that proportional part of the indemnity purchasable at the true age with the payments made hereon, shall be payable, and that if the true age was then more than sixty years, the indemnity payable shall be reduced to a sum equal to the amount actually paid to the Company hereon.

4. The payments required under this policy for the first seven years shall be charged with two dollars annually (unless sooner commuted) for each $1,000 of insurance, payable into the Safety Fund referred to in condition 6 hereof, with the costs of collection, the due proportion of taxes levied hereon or in connection herewith, the expenses of investigations and adjusting death claims, first year's expenses and with dues proportioned annually at the rate of four dollars for each $1,000 of insurance—which dues shall be for the Company's sole use in consideration of its paying all other expenses. From the balance of said payments, after making said charges, shall be paid the actual mortality occurring on policies written upon this form (designated herein as Form 4) during their first seven years; and any excess, as determined by the Company, remaining after payment of said mortality, shall be credited as a dividend upon the eighth and following years. If any deficiency shall occur in said portion of the payments applicable to actual mortality, it shall be made up by proportionate contributions
91 from members holding Form 4 policies in the Safety Fund Department whose seven years have not expired, as levied and called for by the Company hereon upon the basis of the rating of this policy in the Company's table of mortality rates, at the then age of the member, and shall be payable at the same time and in like manner as other required payments hereon are made.

On the first day of March, June, September and December, in every calendar year, after the expiration of the seventh policy year, there shall be due and payable (less such semi-annual distributions as shall be made hereon of the interest and surplus from the said Safety Fund and dividends from first seven years payments) such mortality contributions as shall be levied and called hereon by the Company upon the rating of this policy in the Company's table of mortality rates, at the then respective age of the member according to the ratio which the total like rating of all policies in the same department (after making due allowance for lapses) shall bear to the aggregate matured indemnity fixed upon by the Company to be met; and at the same time there shall be due and payable the cost of collecting said contributions, the due proportion of taxes levied hereon or in connection herewith, the expenses of investigations and adjusting death claims and dues proportioned annually at the rate of four dollars for each $1,000 of insurance—which dues shall be for the Company's sole use in consideration of its paying all other expenses.

If any payment to be made to the Company shall not be paid to it at its Home Office, on the stipulated day due, all right and liability to make payment shall end, and this contract shall cease and determine, and no person shall be entitled to damages, or recovery of any moneys paid hereon. No act of leniency by the Company in respect of any payment shall serve to waive promptness of any subsequent payment on the stipulated day due.

5. Special notices (bearing date thirty days in advance of stipulated dates of payment) addressed to the member, or to the person designated by the member, at the last post-office address appearing on

the Company's books, and mailed at Hartford post-office, postage prepaid, shall be sufficient notice of the amount of any stipulated payment, and the affidavit of the person mailing such notices shall be conclusive proof of the same having been so mailed. Four days' grace after the date fixed herein for payment is allowed, or fourteen days if the designated address is on or west of the meridian of Salt Lake, Utah, or in foreign countries other than Canada. If such special notice be not received it shall nevertheless be a condition precedent to the continuance of this contract that a sum not less than the last prior payment made hereon (exclusive of any reduction by distribution from the Safety Fund) shall be paid upon the stipulated day due at the Company's Home Office, and any balance due must be paid within thirty days thereafter. General notice of payments to be made on the stipulated day due is hereby given and accepted for all purposes of this contract. Any notices sent while any payment shall be past due are to be construed only as notices to make application for reinstatement of membership and shall not serve to extend the stipulated day due. Application for reinstatement, in form provided by the Company, shall accompany every tender of any past due payment, and such application and tender shall not serve to reinstate membership or continue this contract unless the Company shall evidence acceptance thereof by issuing its receipt therefor within the member's lifetime while in good health.

92 6. This policy or certificate of membership is issued in a special department known as the Safety Fund Department, and participates in all benefits of the Trustee's Contract which is printed hereon and referred to and made a part hereof with the same effect as if recited in full in this condition. And if any final distribution of said Safety Fund shall be ordered, as provided for therein, said distribution shall be in lieu of payment hereunder, and all liability of the Company shall cease in respect of this contract.

George E. Keeney's deposition continued as follows:

"Q. Please examine the paper which I now hand you and state whether this is a copy of what is known in the company as form 3 certificate?

"A. It is; yes, sir.

"(Said certificate marked Exhibit No. 4 and is hereto attached.)"

By Mr. Jones: Exhibit No. 4, attached to deposition introduced in evidence.

Said Exhibit No. 4 is as follows:

DEFENDANT'S EXHIBIT 4.

Chas. A. Safford, Notary Public.

No. —. Age —.

The Hartford Life and Annuity Insurance Company, Hartford, Connecticut.

Policy—Safety Fund Department. Amount—$—.

In consideration of the agreements and warrenties made in the application herefor, does hereby issue this Certificate of Membership and Policy of Insurance to.................................. (herein called the member) of......................County of ...., State of...................... And in further consideration of an advance payment of Eight Dollars on each $1,000 of the indemnity named herein, to be made at the date hereof, and of the subsequent payments to be made as required by the fourth condition hereof, the said Company does hereby insure said member during his lifetime, subject to the following agreements:

That ninety days from the receipt by the Company's President or Secretary of satisfactory proofs of the manner and cause of the death of the member, executed as required by the forms furnished by the Company upon notice to it of said death, together with full report of any inquest, all the conditions hereof having been conformed to—upon surrender hereof (receipted to the Company's satisfaction), at its Home Office in Hartford, Conn., where all payments are to be made—there shall be due any payable, in lawful money of the United States, the indemnity of.................................. Dollars (less any unpaid balance of the Safety Fund mentioned in said fourth condition, and less any unpaid balance not yet due
93 of the then current year's payment), to................
....
....
....
....
....
....
..................................legal representatives, or to such other beneficiary as the member shall from time to time designate, with the written consent of the Company;

And upon the express conditions and agreements given elsewhere hereon.

In Witness Whereof, The said Hartford Life and Annuity Insurance Company has, by its President and Secretary, executed this contract, at Hartford, Conn., this .... day of ...., one thousand eight hundred and ninety-........

........................., *President.*

........................., *Secretary.*

Agents of the Company are not authorized to make any indorsements on or to vary the terms of this Certificate.

Annexed is a copy of the application upon which this Contract is based. Particular attention is invited to it, as this Certificate is issued on the faith of the answers and agreements therein made, which if not correct render it invalid.

(Form 3.)
(Ed. June, '94.)

Express Conditions and Agreements Forming Part of This Contract.

When Contract Takes Effect.—Application Made Part of Contract.—Who Only Can Alter or Waive Conditions or Bind Company.—Powers of Agents Defined.—Limitation of Action.

1. This contract shall take effect only when the herein stipulated first payment is made in cash, within the member's lifetime while in good health. The application herefor, and its verification, together with any application for reinstatement are part of this contract. No alteration or waiver of any of the terms and conditions of said contract shall be valid unless made in writing and signed by the Company's President or Secretary. Agents are without power to bind the Company in any manner whatsoever, or to receive moneys for transmission except only that delivery hereof shall be a valid receipt for the hereinbefore stipulated advance payment if then actually made to an agent. No action at law nor suit in equity shall be maintainable, or recovery had hereupon, unless commenced within one year from the date of death of the member; nor shall any act or omission to act of the Company serve to extend this limitation of action.

Assignments, How to be Made.—Company Not Responsible for Validity of Assignments.

2. This contract shall not be assigned, except with the written consent of the Company's President or Secretary, nor unless the original assignment be at once filed in Company's Home Office. Nor (except the assignee hereof shall bear to the member the relationship
94 of wife, husband, child, parent, brother, sister, dependent friend or business partner) shall the amount recoverable exceed the money value of the assignee's then interest as shown to exist by sworn statement rendered to the Company's satisfaction. The Company shall not be responsible for the validity of assignments.

Risks Assumed and Not Assumed.—Incontestability After Three Years.

3. In case of death caused by the member's own hand, whether sane or insane, or caused by, or while engaged in, violation of law or service in the Army or Navy of any government, by the member, the indemnity payable shall be reduced to a sum equal to the amount

actually paid to the Company hereon. After three years from date hereof, this contract shall be incontestable, at the maximum indemnity herein named, unless for fraud, default in payments as and when stipulated, and for understatement of age in said application; provided, however, that if the true age was within the age of sixty years at date of application, then that proportional part of the indemnity purchasable at the true age with the payments made hereon shall be payable, and that if the true age was then more than sixty years, the indemnity payable shall be reduced to a sum equal to the amount actually paid to the Company hereon.

Payments Required.—Where to Make Payments.—Non-payment Terminates Liability of Both Member and Company.

4. On the first day of the Quarterly period (as hereinafter fixed) following the date hereof, the sum of ten dollars for each $1,000 of indemnity shall be paid to the sole use of the Safety Fund mentioned in the Trustee's contract referred to in condition 7 hereof, but the same may be paid in equal installments, on the first day of each of the first eight Quarterly periods. On the first day of March, June, September and December, in every calendar year, after date hereof, there shall be due and payable (less such semi-annual distributions as shall be made hereon of the interest and surplus from the said Safety Fund), such mortality contributions as shall be levied and called hereon upon the rating of this policy in column 1 of the table of mortality rates printed hereon, at the then respective age of the member according to the ratio which the total like rating of all policies in the same department (after making due allowance for lapses) shall bear to the aggregate matured indemnity fixed upon by the Company to be met; and at the same time there shall be due and payable in equal installments to the Company's sole use, for dues, the sum of four dollars per annum on each $1,000 of the indemnity named herein. If any payment to be made to the Company shall not be paid to it at its Home Office, on the stipulated day due, all right and liability to make payment shall end, and this contract shall
95 cease and determine, and no person shall be entitled to damages or recovery of any moneys paid hereon. No act of leniency by the Company in respect of any payment shall serve to waive promptness of any subsequent payment on the stipulated day due.

Notices of Payment.—Grace Allowed.—How to Avoid Default in Payment in Case of Non-receipt of Notice.—Conditions of Reinstatement.

5. Special notices (bearing date thirty days in advance of stipulated dates of payment) addressed to the member, or to the person designated by the member, at the last post-office address appearing on the Company's books, and mailed at Hartford post-office, postage prepaid, shall be sufficient notice of the amount of any stipulated payment, and the affidavit of the person mailing such notices shall be

conclusive proof of the same having been so mailed. Four days' grace after the dates fixed herein for payment is allowed, or fourteen days if the designated address is on or west of the meridian of Salt Lake, Utah, or in foreign countries other than Canada. If such special notice be not received it shall nevertheless be a condition precedent to the continuance of this contract that a sum not less than the last prior payment made hereon (exclusive of any reduction by distribution from the Safety Fund) shall be paid upon the stipulated day due at the Company's Home Office, and any balance due must be paid within thirty days thereafter. General notice of payments to be made on the stipulated day due is hereby given and accepted for all purposes of this contract. Any notices sent while any payment shall be past due are to be construed only as notices to make application for reinstatement of membership and shall not serve to extend the stipulated day due. Application for reinstatement, in form provided by the Company, shall accompany every tender of any past due payment, and such application and tender shall not serve to reinstate membership or continue this contract unless the Company shall evidence acceptance thereof by issuing its receipt therefor within the member's lifetime while in good health.

Payments, How Applicable.

6. If any taxes shall be required by law on this policy, then the payments hereon shall be determined so as to cover the same. The mortality calls shall in no wise be chargeable for any uses or purposes other than their actual cost of collection (including said taxes), the member's proportionate share of medical examination fees and the expenses of investigation and settlement of death claims. The dues and first advance payment shall belong wholly to the Company in consideration of its assuming all other expenses.

96 Trustee's Contract Made Part of Contract.

7. This policy or certificate of membership is issued in a special department known as the Safety Fund Department and participates in all benefits of the Trustee's Contract which is printed hereon and referred to and made a part hereof with the same effect as if recited in full in this condition. And if any final distribution of said Safety Fund shall be ordered, as provided for therein, said distribution shall be in lieu of payment hereunder, and all liability of the Company shall cease in respect of this contract.

Attached to said policy is the following table:

Maximum and Proportionate Table of Mortality Rates for Every $1,000 of Death Loss, on Each $1,000 Indemnity Given Herein.

Age. (Nearest birthday.)	Column 1. Ascending rates.	Column 2. Level rate.	Age. (Nearest birthday.)	Column 1. Ascending rates.	Column 2. Level rate.
15 to 21	$.74	$1.33	44	$1.17	$2.77
22	.75	1.36	45	1.22	2.89
23	.76	1.40	46	1.28	3.01
24	.77	1.43	47	1.35	3.14
25	.78	1.47	48	1.43	3.28
26	.79	1.51	49	1.51	3.42
27	.80	1.56	50	1.59	3.58
28	.81	1.60	51	1.69	3.74
29	.83	1.65	52	1.79	3.92
30	.84	1.70	53	1.91	4.10
31	.86	1.75	54	2.03	4.30
32	.87	1.80	55	2.17	4.50
33	.89	1.86	56	2.31	4.72
34	.91	1.92	57	2.47	4.96
35	.93	1.99	58	2.64	5.21
36	.95	2.05	59	3.03	5.47
37	.97	2.13	60	3.47	
38	.99	2.20	61	3.94	
39	1.01	2.28	62	4.43	
40	1.04	2.37	63	4.96	
41	1.06	2.46	64	5.56	
42	1.09	2.56	65 and over	6.24	
43	1.13	2.66			

Column 1 is for the purpose of ascertaining the ratio of amount to be levied for mortality each quarter. For instance, if the whole number of claims to be met amounted to $250,000, and the aggregate of rates on outstanding policies, per Column 1, amounted to $100,000, then the required ratio would be two and one-half times each policy's rating in Column 1.

Any policy holder, however, on any anniversary of this policy instead of paying on rates ascending (as per Column 1) for
96a each year of life, may, by agreement with the Company in writing, pay (on same ratio as above ascertained) upon a rate fixed level for life at the figure given in Column 2 at his age (nearest birthday) on the date of said anniversary.

The excess of payment made according to Column 2 over the amount that would otherwise be required by Column 1 shall be invested by the Company and used in part payment of the claims arising on policies using Column 2, in proportion to the amount so accumulated by each such policy.

George E. Keeney's deposition continued as follows:

"Q. This form of certificate appears to be, in general terms, a Safety Fund certificate but refers to a table of rates on the back thereof, which is seemingly higher and different from the table of rates on the back of the original certificate issued to Dr. Johnson, and I want you to state about when the company began to issue the form 3 certificates.

A. September 13, 1894.

Q. Now, General, you have testified to the three exhibits, namely, No. 2 being the Safety Fund certificate issued to Dr. Johnson, No. 3 being the form 4 certificate of the seven-year contract, and Exhibit 4 being the Safety Fund contract, with a higher table of rates endorsed thereon. State whether or not it is the fact that during the years beginning, say with 1901 and up to and including 1906, the assessments or calls as levied upon the membership took into account and were levied with respect to the varying terms of payment or rates of assessment provided in those certificates?"

First question on page 7, objected to by Mr. Parks:

Mr. Parks: Object to the question; calls for a conclusion of the witness and a legal opinion, and not the best evidence.

By Mr. Fyke: The best evidence would be the record of the assessments or levies made.

97 By Mr. Jones: The records are introduced of these several assessments, and the matter is fully gone into.

By Mr. Parks: We contend they are not produced, your Honor.

By the Court: Objection overruled at the present time.

Plaintiff excepts.

"A. They were.

Q. And in making the assessment you took into account the varying terms under which the contracts were issued in each case as to rates?"

Plaintiff makes same objection.

The Court made the same ruling and the plaintiff excepted.

"Q. Please state the date of call or assessment No. 95.

A. The call was laid April 1, 1902, and the payments under that call were due June 1, 1902.

Q. The call itself bearing what date?

A. May 2, 1902.

Q. Please state whether the paper which I now hand you is a copy of notice of call to Dr. J. T. Johnson, Schell City, under certificate 109,854?

A. It is.

Q. When was the original of that notice sent out, Mr. Keeney?

A. May 2, 1902.

(Paper referred to, being first notice to Dr. Johnson, is marked Exhibit No. 6 and is attached hereto.)"

By Mr. Jones: Exhibit No. 6, attached to the deposition, is introduced in evidence.

Said Exhibit No. 6 is as follows:

98 DEFENDANT'S EXHIBIT 6.

Charles A. Safford, Notary Public.

Form 0234.

Special Notice of Quarterly Call No. 95.

Hartford Life Insurance Company, Hartford, Conn. $1.40.

May 2nd, 1902.

This Call, which will be due June 1, 1902, is made to meet 137 Deaths, Benefits, $369,859 as shown by accompanying list, and expenses on your policy, as follows:

For Mortality Call		$70 80
" Quarterly Dues to Sept. next		3 75
Credit	$	
Amount Due		$74 55

5-109854

J. T. Johnson, M. D., Schell City, Mo.

Payment will not be accepted later than June 5, 1902, unless residence is on or west of the meridian of Salt Lake, Utah, in which case payment will be accepted up to and including June 15, 1902.

Unless the payment called for by this notice shall be paid to the Company at its Home Office by or before the day it falls due the policy and all payments thereon will become forfeited and void.

Return this notice with remittance payable to Hartford Life Insurance Company.

Make all remittances by Draft, Check, P. O. or Express Money Order when possible. Letters containing currency must be registered.

Special Notice.

If the payment of the above Quarterly Call is not received at this office on or before June 5, 1902, the last day allowed for payment in the above notice, a second notice will be mailed to the policy-holder by registered letter, giving until June 20, 1902, to remit, and the same charge will be made for this second notice, as fixed by the law of Massachusetts, namely, fifty cents.

Every member whose payment does not reach this office on or before June 5, 1902, will be obliged to pay this fifty-cent fee in order to have the policy unconditionally reinstated.

After June 20, 1902, the limit allowed for payment under the registered notice, the Company reserves the right to require a medical examination as a condition of reinstatement.

If residence is on or west of the meridian of Salt Lake, Utah, ten days additional is allowed.

Your next Quarterly Call will fall due and be payable Sept. 1, 1902.

George E. Keeney's deposition continued:

"Q. Was there a second notice sent to Dr. Johnson?

A. There was.

99 Q. Under what date?

A. June 10, 1902.

Q. How was that sent?

A. Registered mail.

Q. Was the first notice, Exhibit No. 6, sent by ordinary mail, or by registered mail?

A. Ordinary mail.

Q. And the second notice was sent by registered mail?

A. It was.

Q. Please state whether the paper which I now hand you, dated June 10, 1902, is a copy of the second or registered notice to Dr. Johnson?

A. It is.

Q. The paper which you refer to as dated June 10th recites that a duplicate of the notice of May 2, 1902, was enclosed with the notice of June 10th. Is the paper which I now hand you endorsed across the face "Second Notice," a copy or duplicate of the notice of May 2 referred to in the communication of June 10, 1902?

A. It is.

(The registered letter notice of June 10th, which was a duplicate of the notice of May 2, is attached hereto and marked Exhibit 7.)"

By Mr. Jones: Exhibit No. 7, attached to the deposition is introduced in evidence.

Said Exhibit No. 7 is as follows:

DEFENDANT'S EXHIBIT 7.

Charles A. Safford, Notary Public.

Form 0260.

Registered Letter Notice.

Hartford Life Insurance Company, Hartford, Conn.

June 10, 1902.

You are hereby notified that Quarterly Call No. 95, on Policy No. 5—109854, notice of which was mailed you May 2, 1902, and duplicate of which is enclosed herewith, has not been paid.

Unless the amount of $75.05, the amount due on said Quarterly Call, including fifty cents for this notice, is received at this office on or before June 20, 1902, your policy will be cancelled.

June 30th if residence is on or west of the meridian of Salt Lake, Utah.

CHAS. H. BACALL, *Secretary.*

100 Form 0234.

Special Notice of Quarterly Call No. 95.

Second Notice.

Hartford Life Insurance Company, Hartford, Conn., $1.40

May 2nd, 1902.

This Call, which will be due June 1, 1902, is made to meet 137 Deaths, Benefits, $369,859 as shown by accompanying list, and expenses on your policy, as follows:

For Mortality Call		$70 80
For Quarterly Dues to Sept. next		3 75
Credit	$	
Amount due		$74 55

J. T. Johnson, M. D., Schell City, Mo.

5—109854.

Payment will not be accepted later than June 5, 1902, unless residence is on or west of the meridian of Salt Lake, Utah, in which case payment will be accepted up to and including June 15, 1902.

Unless the payment called for by this notice shall be paid to the Company at its Home Office by or before the day it falls due the policy and all payments thereon will become forfeited and void.

Return this notice with remittance payable to Hartford Life Insurance Company.

Make all remittances by Draft, Check, P. O. or Express Money Order when possible. Letters containing currency must be registered.

Special Notice.

If the payment of the above quarterly call is not received at this office on or before June 5, 1902, the last day allowed for payment in the above notice, a second notice will be mailed to the policy-holder by registered letter, giving until June 20, 1902, to remit, and the same charge will be made for this second notice as is fixed by the law of Massachusetts, namely, fifty cents.

Every member whose payment does not reach this office on or

before June 5, 1902, will be obliged to pay this fifty-cent fee in order to have the policy unconditionally reinstated.

After June 20, 1902, the limit allowed for payment under the registered notice, the Company reserves the right to require a medical examination as a condition of reinstatement.

If residence is on or west of the meridian of Salt Lake, Utah, ten days additional time is allowed.

Your next Quarterly Call will fall due and be payable Sept. 1, 1902.

George E. Keeney's deposition continued as follows:

Q. Please state whether with the notice of mortuary call No. 95 there was enclosed a list of the death claims for which that call or assessment was levied?

A. There was.

101 Q. Please state whether the paper which I now hand you is a copy of such list of death claims enclosed with that notice?

A. It is.

(Above paper attached hereto and marked Exhibit 8.)

By Mr. Jones: Exhibit No. 8, attached to the deposition, is introduced in evidence.

Said Exhibit No. 8 is as follows:

DEFENDANT'S EXHIBIT 8.

Charles A. Safford, Notary Public.

The Hartford Life Insurance Company.

The following Members having died, the Claims of their Beneficiaries are included in the Regular Quarterly Call, No. 95, notice of which accompanies this List.

Members.	Location.	Date of death.	Amt. In.
Martin L. Hine	Springfield, Mass.	Nov. 24, 1901,	$2,000
Charles H. Payson	Westport, N. S.	Dec. 3, 1901,	1,000
Johannes J. Westland	South Manchester, Conn	Dec. 20, 1901,	1,000
James P. Lewis	Washington, D. C.	Dec. 22, 1901,	5,000
James Daws	Bridgeport, Conn	Dec. 23, 1901,	2,000
John Donnelly	Rutland, Vt.	Dec. 24, 1901,	1,000
George W. Dutcher	Rockford, Ill.	Dec. 25, 1901,	1,000
Edwin B. Foster	Westerly, R. I.	Dec. 27, 1901,	2,000
Henry H. James	N. Middleboro, Mass	Dec. 28, 1901,	1,000
James Cook	Leeds, N. Y	Jan. 2, 1902,	2,000
Frederick Walker	Brooklyn, N. Y	Jan. 2, 1902,	5,000
William Renschler	Carmi, Ill	Jan. 4, 1902,	2,000
Rev. S. W. Mitchell	Scammon, Kans	Jan. 4, 1902,	2,000
Samuel J. Howard	Milton, Vt	Jan. 5, 1902,	2,000
David Sayers	Denver, Colo	Jan. 5, 1902,	1,000
Lawrence Connery	St. Louis, Mo	Jan. 5, 1902,	5,000
Thacher W. Bannon	Dallas, Texas	Jan. 6, 1902,	1,000
Abraham Isaacs	Nashville, Tenn	Jan. 6, 1902,	2,000
Frederick T. Shufflebotham	Elkhart, Ind	Jan. 7, 1902,	959

Peter Y. Lant	Newton, Iowa	Jan. 7, 1902,	2,000
Patrick Young	New York, N. Y	Jan. 8, 1902,	2,000
Heinrich Kempf	Brooklyn, N. Y	Jan. 8, 1902,	1,000
Charles A. Post	Hartford, Conn	Jan. 9, 1902,	5,000
Edward Caddy	Springfield, Mass	Jan. 9, 1902,	5,000
Alva W. Parmalee	Danbury, Conn	Jan. 10, 1902,	1,000
Aaron Weiss	Elizabeth, N. J	Jan. 10, 1902,	2,000
Virgil C. Curtis	Mt. Carmel, Ill	Jan. 10, 1902,	5,000
Richard S. Evans	Glenville, Ohio	Jan. 10, 1902,	2,000
William H. Johnson	New Haven, Conn	Jan. 11, 1902,	3,000
Andrew F. Wilder	Brattleboro, Vt	Jan. 11, 1902,	400

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Daniel Grady	New Haven, Conn	Jan. 12, 1902,	3,000
Wilbur A. Williams	Southington, Conn	Jan. 12, 1902,	1,000
Joseph A. Tenner	St. Paul, Minn	Jan. 13, 1902,	5,000
Rev. J. C. Harvey	Somerville, Mass	Jan. 13, 1902,	1,000
William N. McKnight	Dyersburg, Tenn	Jan. 14, 1902,	3,000
Cornelius Ryan	Dubuque, Iowa	Jan. 15, 1902,	5,000
Patrick McCarthy	Springfield, Mass	Jan. 16, 1902,	1,000
Stephen D. Hoskins	Jefferson, Ohio	Jan. 17, 1902,	2,000
William C. Nichols	Cresco, Iowa	Jan. 17, 1902,	5,000
Edward J. Hartnett	Chicago, Ill	Jan. 18, 1902,	3,000
Edward E. Smith	Penn's Grove, N. J	Jan. 18, 1902,	2,000
William Griesinger	Bridgeport, Conn	Jan. 19, 1902,	1,000
James R. N. Hudson	Providence, R. I	Jan. 19, 1902,	1,000
Jehu R. Cover	Anna, Ill	Jan. 19, 1902,	6,000
Dwight B. Hervey	Perry, N. Y	Jan. 20, 1902,	2,500
Charlotte D. Goodrich	Vernon, Conn	Jan. 20, 1902,	2,000

Members.	Location.	Date of death.	Amt. In.
Charles H. Wetmore	Bloomville, N. Y	Jan. 21, 1902,	1,000
Henry N. Goodloe	Porterfield, Tenn	Jan. 23, 1902,	1,000
Oscar C. Squyer	Minneapolis, Minn	Jan. 27, 1902,	5,000
Jno. A. Orcutt, Jr.	Monson, Mass	Jan. 28, 1902,	1,000
J. McCarthy	Springfield, Mass	Jan. 28, 1902,	1,000
Lane B. Schofield	Boston, Mass	Jan. 29, 1902,	2,500
Lewis B. Weikel	Dayton, Ohio	Jan. 29, 1902,	3,000
Joseph Bishop	Meriden, Conn.	Jan. 30, 1902,	2,000
Fred A. Douglass	Burlington, Vt	Jan. 30, 1902,	1,000
Louis Ritter	Cleveland, Ohio	Jan. 31, 1902,	2,000
Joseph T. Dill	Brooklyn, N. Y	Feb. 1, 1902,	5,000
A. L. Williamson, M. D.	Humboldt, Nebr	Feb. 3, 1902,	1,000
Adelbert A. Eno	Syracuse, N. Y	Feb. 3, 1902,	2,000
Nat F. Dortch	Nashville, Tenn	Feb. 4, 1902,	5,000
William F. Gilbert	Georgetown, Conn	Feb. 5, 1902,	2,000
Geo. Kraus	Brooklyn, N. Y	Feb. 5, 1902,	1,000
Robert M. Wilkie	Halifax, N. S	Feb. 6, 1902,	3,000
Samuel Webster	Bridgeport, Conn	Feb. 6, 1902,	1,000
Philip Leahy	Fairhaven, Vt.	Feb. 7, 1902,	1,000
Albert S. Truesdell	Putnam, Conn	Feb. 7, 1902,	1,000
Charles W. Bradley	Altoona, Pa.	Feb. 8, 1902,	2,000
John C. Wolz	Iowa City, Ia.	Feb. 8, 1902,	1,000
Thomas Page	Schenevus, N. Y	Feb. 9, 1902,	1,500
Warden W. Ward	Seehorn, Ill	Feb. 9, 1902,	1,000
Jacob Hirsh	New York, N. Y	Feb. 9, 1902,	3,000
Oscar F. Adams	Tarborough, N. C	Feb. 10, 1902,	1,000
Jacob S. King	Thomaston, Ga	Feb. 11, 1902,	1,000
Winfield Hixson	Raritan, Ill	Feb. 11, 1902,	5,000

Conrad Blumeyer	St. Louis, Mo	Feb. 12, 1902,	3,000
Justa J. Catlin	Elizabeth, N. J	Feb. 11, 1902,	5,000
William H. Wagner	Madison, S. D	Feb. 12, 1902,	3,000
Charles H. Dye	Cottontown, Tenn	Feb. 12, 1902,	5,000
James M. Hale	Knoxville, Tenn	Feb. 14, 1902,	3,000
Joseph Florsheim	Chicago, Ill	Feb. 15, 1902,	5,000
Henry Starke	Athens, N. Y	Feb. 15, 1902,	5,000
John Dunn	Albany, N. Y	Feb. 15, 1902,	5,000
James A. Smith	St. Louis, Mo	Feb. 15, 1902,	10,000
Riverius Marsh	New Brunswick, N. J	Feb. 16, 1902,	5,000
William H. Murphy	Fort Hasting, N. B	Feb. 16, 1902,	1,000
Nelson R. Lloyd	Chicago, Ills	Feb. 17, 1902,	1,000
M. Gillmore	Nashville, Tenn	Feb. 17, 1902,	2,000

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Andrew Reynolds	Cleveland, Ohio	Feb. 17, 1902,	1,000
Craton Belknap	Bridgeport, Conn.	Feb. 18, 1902,	1,000
David Landon	Rhinebeck, N. Y	Feb. 18, 1902,	1,000
John N. Dowden	Los Angeles, Cal	Feb. 19, 1902,	3,000
Michael B. Welch	Worcester, Mass	Feb. 20, 1902,	3,000
Robert A. Lewis	Kansas City, Mo	Feb. 20, 1902,	5,000
John Bennett	Portland, Maine	Feb. 20, 1902,	3,000
James Conway	Worcester, Mass	Feb. 21, 1902,	2,000
E. C. Fleming	Xenia, Ohio	Feb. 21, 1902,	5,000
Geo. B. Moore	Princeton, Ind	Feb. 21, 1902,	3,000
A. H. Hulian, M. D	Janesville, Cal	Feb. 21, 1902,	1,000
Henry Meyerer	Chicago, Ill	Feb. 23, 1902,	5,000
Thomas Murphy	S. Boston, Mass	Feb. 23, 1902,	2,000
William H. McNall	Westford, Vt	Feb. 23, 1902,	1,000

Members.	Location.	Date of death.	Amt. In.
John Ackerman	New Haven, Conn	Feb. 24, 1902,	1,000
Henry J. Walter	Aledo, Ill	Feb. 24, 1902,	1,000
Joseph Christoper	St. Louis, Mo	Feb. 24, 1902,	2,000
Guy M. Bates	Burlington, Vt	Feb. 25, 1902,	1,000
Frederick Walter	St. Louis, Mo	Feb. 25, 1902,	10,000
James D. Campbell	Cincinnati, Ohio	Feb. 26, 1902,	5,000
Frank Heppenstiel	Newark, N. J	Feb. 26, 1902,	1,000
William J. Denman	Atlanta, Ga	Feb. 28, 1902,	2,000
William H. Smith	San Francisco, Cal	Feb. 28, 1902,	2,000
Frederick Meyer	Elizabeth, N. J	Mar. 1, 1902,	1,000
William Stuber	Paris, Tenn	Mar. 2, 1902,	5,000
James Compton	Washington, D. C	Mar. 3, 1902,	5,000
Newton Churchill	New York, N. Y	Mar. 4, 1902,	5,000
Frank Becker	Paterson, N. J	Mar. 5, 1902,	1,000
Patrick G. Murphy	Danbury, Conn	Mar. 5, 1902,	1,000
John W. Kalfus	Phœnix, Ariz	Mar. 5, 1902,	3,000
Louis F. Walther	Georgetown, O	Mar. 5, 1902,	2,000
Frank W. Cottle	Elkhart, Ill	Mar. 5, 1902,	5,000
Ransom B. Spencer	Prompton, Pa	Mar. 5, 1902,	1,000
William H. Klyce	Brownsville, Tenn	Mar. 6, 1902,	2,000
M. H. Longshore	West Point, Ga	Mar. 8, 1902,	2,000
Pierre Chapdelaine	Taftville, Conn	Mar. 8, 1902,	3,000
John Lindsay	St. Louis, Mo	Mar. 8, 1902,	3,000
Ezra C. Butler	E. Albany, Vt	Mar. 9, 1902,	1,000
Richard Tyler	Meriden, Conn	Mar. 9, 1902,	3,000
John J. Dawkins	Ithaca, N. Y	Mar. 9, 1902,	2,000
Albert Wintter	Bridgeport, Conn	Mar. 10, 1902,	5,000
P. E. Dutcher	Milwaukee, Wis	Mar. 10, 1902,	10,000

Thomas Haggerty	Meriden, Conn.	Mar. 10, 1902,	2,000
Julius Schwarbe	Meriden, Conn.	Mar. 11, 1902,	1,000
William F. Lippitt, M. D.	Charlestown, W. Va	Mar. 11, 1902,	5,000
William Gilman	Chicago, Ill	Mar. 11, 1902,	3,000
Edward S. Shimer	Philadelphia, Pa	Mar. 13, 1902,	3,000
Horace Barber	Warehouse Point, Conn	Mar. 14, 1902,	5,000
H. M. Hammett	Waxahachie, Texas	Mar. 15, 1902,	2,000
Horace R. Ford	Chicago, Ill	Mar. 15, 1902,	3,000

107 Q. And what is the aggregate of the three amounts shown as the result of one rate in the method which you have described on all three forms of certificates?

A. $100,451.90.

Q. And that is tabulated on the record before you and is shown on what will be Exhibit 9, is it not?

A. It is.

Q. Now, in the certificate issued to the plaintiff in each of these cases there is a provision with respect to the making of the assessment, which recites that it shall be made "with due allowance for discontinuance of membership," and I call your attention to the item on the record now before you and which will appear on page 3 of what will be Exhibit 9, which reads: "Allow for lapse 5%, $5,022.60," and please state what that item refers to.

A. That is the amount with the 5% lapse that would have to be deducted from the $100,451.90 to show what the company would net from one rate laid on all these policies, less the estimated lapse of 5%, which would be $95,429.30.

Q. Please state whether there was any method by which you could accurately and absolutely determine in advance what the amount of lapse would be on any given assessment?

A. There is no absolute amount that can be determined.

Q. And how and by whom was the amount of 5%, fixed or determined?

A. By the President and Secretary of the company at the time that the assessment was laid.

Q. And was what their judgment indicated as a proper allowance at that time?

A. It was.

Q. And by the term "lapse" as used in the record before you, from which I have quoted, you mean the allowance for dis-
108 continuance of membership, which is referred to in the policy?

A. The term we use for the discontinuance of membership is the word "lapse."

Q. Now, one rate as thus calculated would produce how much?

A. $95,429.30.

Q. Was that sufficient to meet the death losses on hand and unpaid and not previously assessed for?

A. It was not.

Q. Now, will you please state how many times $95,429.30 you felt called upon to require from the members, or undertook to collect from the members, in order to produce $362,500?

A. 3.8 times.

Q. And that per cent is arrived at by dividing $95,429.30 into $362,500, and the exact percentage realized by the defendant is what?

A. 3.798.

Q. Now, those three papers which you see here, pasted together, are a copy of the record from which you have been testifying, are they not?

A. They are.

(Paper is hereto attached and marked Exhibit 9.)

By Mr. Jones: Exhibit No. 9, attached to the deposition, is introduced in evidence.

Said Exhibit No. 9 is as follows:

DEFENDANT'S EXHIBIT No. 9.

Charles A. Safford, Notary Public.

Regular Safety Fund Policies.

Calculation of Call No. 95.

Age.	Rate.	Amount.	Product.
25	73	$2,000	$1.46
26	75	6,000	4.50
27	77	8,000	6.16
28	79	23,500	18.57
29	81	42,500	34.43
30	83	46,000	38.38
31	85	73,000	62.06
32	88	98,500	86.68
33	91	98,000	89.18
34	94	181,500	170.61

109

Age.	Rate.	Amount.	Product.
35	97	231,000	224.07
36	100	247,500	247.50
37	103	272,500	280.67
38	106	366,000	387.96
39	109	474,000	516.66
40	112	541,000	605.92
41	114	697,500	795.15
42	116	674,000	781.84
43	118	763,000	900.34
44	120	1,077,000	1,292.40
45	122	1,062,000	1,295.64
46	125	931,500	1,164.37
47	130	1,121,500	1,457.95
48	135	1,229,500	1,659.82
49	140	1,282,500	1,795.50
50	147	1,344,000	1,975.68
51	154	1,559,500	2,401.63
52	163	1,511,000	2,462.93
53	172	1,499,000	2,578.28
54	181	1,549,000	2,803.69

Age.	Rate.	Amount.	Product.
55	.192	1,536,000	2,949.12
56	.203	1,452,500	2,948.57
57	.215	1,479,000	2,179.85
58	.232	1,595,750	3,702.15
59	.250	1,451,000	3,627.50
60	.268	1,292,500	3,463.90
61	.286	1,483,000	4,241.38
62	.308	1,280,500	3,943.94
63	.330	1,175,500	3,879.15
64	.365	1,168,000	4,263.20
65	4..	907,500	3,630.00
66	4..	1,016,000	4,064.00
67	4..	885,500	3,542.00
68	4..	809,000	3,236.00
69	4..	776,000	3,104.00
70	4..	704,500	2,818.00
71	4..	536,000	2,144.00
72	4..	602,000	2,408.00
73	4..	452,000	1,808.00
74	4..	369,500	1,478.00
75	4..	395,500	1,582.00
76	4..	360,500	1,442.00
77	4..	309,500	1,238.00
78	4..	203,500	814.00
79	4..	145,000	580.00
80	4..	79,000	316.00
81	4..	54,000	216.00
82	4..	35,000	140.00
83	4..	8,000	32.00
84	4..	2,000	8.00
85	4..	.....	.....
86	4..	2,000	8.00
87	4..	.....	.....
88	4..	.....	.....
89	4..	1,000	4.00
		$41,578,750	$95,950.79

110 Form 3.—Men's Division.

Age.	Rate.	Amount.	Product.
26	79	$2,000	$1.58
27	80	2,000	1.60
28	81	1,000	.81
29	83	5,500	4.57

Age.	Rate.	Amount.	Product.
30	84	6,000	5.04
31	86	15,000	12.90
32	87	7,000	6.09
33	89	3,000	2.67
34	91	11,500	10.47
35	93	18,000	16.74
36	95	14,000	13.30
37	97	19,000	18.43
38	99	11,000	10.89
39	101	15,000	15.15
40	104	19,000	19.76
41	106	19,000	20.14
42	109	32,500	35.43
43	113	18,000	20.34
44	117	26,500	31.01
45	122	26,000	31.72
46	128	52,500	67.20
47	135	23,000	31.05
48	143	26,000	37.18
49	151	29,500	44.55
50	159	31,500	50.09
51	169	26,000	43.94
52	179	49,000	87.71
53	191	27,500	52.53
54	203	48,000	97.44
55	217	55,000	119.35
56	231	32,000	73.92
57	247	29,500	72.87
58	264	24,500	64.68
59	303	22,000	66.66
60	347	25,000	86.94
61	394	19,000	74.86
62	443	18,500	81.96
63	496	24,500	121.52
64	556	5,000	27.80
65	624	8,000	49.92
66	624	3,500	21.84
67	624	3,000	18.72
68	624	.....	.....
69	624	.....	.....
		$853,500	$1,671.37

111

Form 4.—Men's Division.

Age.	Rate.	Amount.	Product.
25	78	$3,500	$2.73
26	79	3,500	2.77
27	80	5,000	4.00
28	81	2,000	1.62
29	83	1,000	.83
30	84	4,500	3.78
31	86	16,500	14.19
32	87	15,000	13.05
33	89	14,000	12.46
34	91	20,500	19.07
35	93	26,000	24.18
36	95	20,500	19.48
37	97	32,000	31.04
38	99	30,500	30.20
39	101	23,000	23.23
40	104	44,000	45.76
41	106	34,500	36.57
42	109	51,000	55.59
43	113	47,500	53.68
44	117	46,000	53.82
45	122	88,000	107.36
46	128	25,500	32.64
47	135	69,500	93.83
48	143	40,000	57.20
49	151	25,000	37.25
50	159	46,000	73.14
51	169	73,000	123.37
52	179	48,000	85.92
53	191	53,000	101.23
54	203	60,000	121.80
55	217	44,500	96.57
56	231	32,000	73.92
57	247	56,000	138.32
58	264	34,500	90.08
59	303	59,500	180.29
60	347	51,000	176.97
61	394	42,000	165.48
62	443	48,500	214.86
63	496	28,500	141.36
64	556	11,000	61.06
65	624	15,000	93.60
66	624	17,500	109.20
67	624	1,000	6.24
68	624	.....	.....
69	624	.....	.....
		$1,409,500	$2,829.74

One rate assessment..............................	$ 95,950.79
Form 3....................................	1,671.37
Form 4 tr..................................	2,829.74
	$100,451.90
Allow for lapse 5 per cent........................	5,022.60
One rate produces..........................	$ 95,429.30
Losses assessed for June call......................	$362,500.00

Rate, 3.8.

112 George E. Keeney's deposition continued as follows:

Q. Now, will you please state the amount produced or that would be produced by multiplying $95,429.30 by 3.8%?

A. The exact amount produced by multiplying $95,429.30 by 3.8% is $362,631.34.

Q. Please state at what age Dr. James T. Johnson was assessed on call No. 95.

A. He was assessed at 64.

(It is stipulated between counsel for the plaintiff Nannie M. Johnson, and the defendant, that Dr. James T. Johnson was born February 8, 1836, and that he so advised the company February 27, 1889, the application being dated October 27, 1888. The company thereafter continued to carry the certificate and makes no defense in this case because of such misstatement of age.)

Q. Now, will you please indicate the rate or ratio shown on the table on the back of the policy issued to Dr. James T. Johnson, a copy of which is Exhibit No. 2, opposite the age 64?

A. 5.48.

Q. The certificate issued to Dr. Johnson provides that after the payment of $10 to the Safety Fund "the basis of all subsequent mortality calls shall be two-thirds only of the table given hereon." Please state whether in 1902 Dr. Johnson had long since paid his contribution of $10 to the Safety Fund?

A. He had.

Q. So that in 1902 the basis of the assessment or the rate for determining the assessment as against Dr. Johnson at age 64 was two-thirds of the rate shown opposite age 64, or two-thirds of $5.48

A. It was.

Q. Now, will you please tell us what two-thirds of $5.48 is?

A. $3.654.

Q. Will you please state how the amount of Dr. Johnson's assessment was determined, using two-thirds of $5.48 or $3.654 as the basis of that assessment?

113 A. The computation of the call due June 1, 1902, on policy No. 109,854, on the life of Doctor James T. Johnson, was made as follows:

Amount raised by assessment of one rate at attained age on insurance in force at time of computation in the men's division	$100,451.90
Allowing 5% for lapses, 95% of the above amount would be	95,429.35
Total amount to be raised	332,500.00
Dividing this latter amount by 95,429.35 we get a quotient of	3.798
From this the ratio was fixed at	3.80

Policy No. 109854 was issued November 1st, 1888, at the insuring age of 51. The last anniversary of the policy at the time of this computation was November 1st, 1901, at which time the insuring age was changed to 64, and that was the attained age used on this policy on this call. The rate for age 64 on the policy was $5.48, two-thirds of this being $3.654 the rate used. Multiplying this rate by 3.80 the ratio, we get $13.88 for $1,000, or $69.40 for $5,000, the policy in question being for that amount. To this $69.40 was added a 2% tax of $1.40 and the dues of $3.75, making a total of $74.55, which was the amount assessed for on this policy. As the payment was not made in the four days of grace allowed by the company's rules, 50 cents delinquent fee was added, making the amount due when the extension was granted $75.05. The correct insuring age of the insured at the time the policy was issued was 52 and his correct insuring age on the call in question was that for 65, and the assessment for mortality should have been therefore $76.00, using the rate of $4.00, which would have made the amount of the assessment $81.70.

114 Q. Call No. 95 was made up according to your records, a copy of which is Exhibit No. 9, on April 1, 1902, but the call itself as sent to Dr. Johnson is dated May 2, 1902. Will you please state why the figures are made up as of the first date April 1st, and the notice not dated or sent out until May 2?

A. We are obliged to have practically thirty days to make up all the notices, and mail them, get them ready for mailing to our members. All of those notices must go out thirty days before the call is due, which in this instance is June 1st.

Q. Why did you need thirty days in which to make up these notices and get them out, because of the volume of business?

A. It requires that length of time to get the notices up.

Q. About how many members have you?

A. About 15,000 now.

Q. About how many had you in 1902?

A. Oh, I should think about 25,000.

Q. And they reside in different parts of the country?

A. They reside not only in different parts of this country but in several others, some in Canada and Mexico.

Q. So that the figures on which the assessment dated May 1st was made up are really figures as to the condition of the Safety Fund Department thirty days prior to that date?

A. They are.

Q. And under the terms of the certificate, thirty days have to elapse from the date of the notice before the call becomes due?

A. It does.

Q. When do you begin to receive money on that call?

A. About the 15th of May we would begin to get in these payments and they should all be in before June 1st.

115 Q. Now, is there a period of grace allowed on the call over and above June 1st?

A. All members receive four days' grace, and a member not making his payment within that grace period we send him a registered letter with a second notice which gives him until the 20th of the month, in this case June 20th. That applies to all members residing east of Salt Lake, Utah; west of Salt Lake, Utah, they are allowed ten days additional in which to make their payments.

Q. How often and at what periods are assessments levied in the Safety Fund Department of the company?

A. Once in three months—on the first of January, April, July and October.

Q. About what were the aggregate death losses of the association per month, beginning with 1901 and running down to and including 1906?

A. Why they ran about $100,000 a month—some years a little under and some years a little over, but very close to $100,000 a month.

Q. I hand you a tabulation which I will have marked Exhibit 10, and get you to state whether or not it correctly sets forth the amount received from mortuary calls and the amount paid for death losses year by year, beginning with 1880, running down to and including 1908.

A. It does.

(Said paper marked Exhibit No. 10 and is hereto attached.)

By Mr. Jones: Exhibit No. 10, attached to the deposition, is introduced in evidence.

116 Said Exhibit No. 10 reads as follows:

DEFENDANT'S EXHIBIT No. 10.

Charles A. Safford, Notary Public.

The Company received for mortuary purposes, and paid for death losses, during this long period, totals as follows:

Table No. 1.

	Received from mortality calls.	Paid for death losses.		Received from mortality calls.	Paid for Death losses.
1880	$21,551.02	$17,965.00	1896	$1,125,972.73	$1,108,487.37
81	118,263.17	111,603.00	97	1,121,550.87	1,241,921.17
82	158,710.19	147,440.00	98	1,289,080.22	1,130,084.20
83	210,823.83	199,165.00	99	1,279,544.53	1,201,784.49
84	217,047.36	207,427.00	1900	1,297,629.67	1,347,949.07
85	386,204.91	434,415.00	01	1,402,750.62	1,403,343.01
86	515,029.50	516,940.00	02	1,371,681.50	1,333,691.73
87	573,775.08	531,589.00	03	1,177,544.63	1,167,953.16
88	626,517.40	625,466.00	04	1,341,198.26	1,269,899.72
89	676,937.06	702,368.94	05	1,341,165.22	1,444,994.11
90	800,199.27	779,085.55	06	1,277,385.39	1,217,377.79
91	906,179.19	905,122.00	07	1,170,510.06	1,110,045.50
92	1,065,525.94	1,023,608.28	08	1,183,143.62	1,296,621.37
93	996,065.14	1,059,775.00	Balance, Dec. 31, '08		99,309.31
94	1,031,351.22	1,039,561.00			
95	1,132,808.93	1,141,153.76		$25,816,146.53	$25,816,146.53

Total mortuary receipts from 1880 to December 31, 1908		$25,816,146.53
Total death losses paid during that time	$25,716,837.22	
Balance of cash in Mortuary Fund	99,309.31	
	$25,816,146.53	$25,816,146.53

Table No. 1 accounts for every dollar received for mortuary purposes during this entire period, and this Company has in its possession the proper papers and receipts for each individual death loss paid from this Mortuary Fund from 1880 to December 31, 1908.

George E. Keeney's deposition continued as follows:

Q. The respective years being indicated in the first column, the amount received from assessments or mortuary calls appear in the second column, and the amount paid to members or to the beneficiaries of members, appearing in the third column; is that correct?

A. It is.

Q. Will you please state whether the paper I now hand you correctly shows the balance in the mortuary fund or mortality
117 fund of the Safety Fund Department of this Association at the end of each month, beginning with December 31, 1901, and running down to and including December 31, 1902, and the amount of death losses outstanding and unpaid at those respective dates?

A. It does.

Q. The date appearing in the first column, the amount in the mortuary fund in the second column under the head "Mortuary Balance," and the amount of death losses for which claims have been made and which was unpaid at the respective dates appearing in the third column under the head "Outstanding Losses"?

A. They do.

(Said paper is hereto attached and marked Exhibit 11.)

By Mr. Jones: Exhibit No. 11 attached to the deposition, is introduced in evidence.

Said Exhibit No. 11 is as follows:

DEFENDANT'S EXHIBIT NO. 11.

Charles A. Safford, Notary Public.

	Mortality balance.	Outstanding losses.
December 31, 1901............	$77,264.01	$300,500.00
January 31, 1902............	62,606.20	394,200.00
February 28, 1902............	126,718.92	446,380.00
March 31, 1902............	179,710.78	466,921.00
April 30, 1902............	47,462.17	444,601.05
May 31, 1902............	39,890.54	386,427.03
June 30, 1902............	101,647 43	379,327.03
July 31, 1902............	22,897.38	369,809.05
August 31, 1902............	45,067.59	338,825.21
September 30, 1902............	173,616.70	344,545.42
October 31, 1902............	90,725.45	325,896.60
November 30, 1902	141,559.31	354,991.60
December 31, 1902............	115,253.78	271,635.97

George E. Keeney's deposition continued as follows:

Q. Please state whether the paper I now hand you shows the balance in the mortuary fund and the amount of outstanding and un-

George E. Keeney's deposition continued as follows:

Q. What is the paper which I now hand you?

A. This is a schedule from which we make up the assess-
104 ments.

Q. That is one of the original records of the company?

A. This is the original record for the calls numbered on this page.

Q. And that record includes call No. 95?

A. It does.

Q. And call No. 95 was based upon the list of deaths contained in Exhibit 8?

A. It was.

Q. Does Exhibit 8 contain a list of members of the Safety Fund Department that had been reported to the association as having died and for whose deaths previous assessments had not been levied?

A. It did.

Q. Now, referring to the record which you have in your hand, being calculation and determination of assessments, state what the total amount of death losses were for which that assessment was levied?

A. $362,500.

Q. Please state whether claims under policies in the Safety Fund Department of the association had been made against the association at the time that call No. 95 was made up that aggregated $362,500.

A. They had.

Q. Please state whether for each and all of those claims any previous assessment had been made upon the members.

A. There had not.

Q. Will you please describe the method by which call No. 95 was made up.

A. The same method is used in laying all calls of the company and has been for a long time, as I will explain, and was used in laying call No. 95. We take the amount of insurance in force for every age in that department and multiply that by the rate in the table on the back of the certificate, at that age. For instance, at age 25, in call 95, there was $2,000 of insurance in force. The rate for that age is 73 cents—that is one rate on the back of the certificate—73 cents—and we multiply 73 cents by the $2,000,
105 which gives $1.46 that would be paid by all the members of that age. As there are only two there at $2,000, I will take age 60 as another illustration. The rate, as you will see, at age 60 on that sheet is $2.68. There is $1,295,500 of insurance in force at that age, which multiplied by the table rate of $2.68 gives $3,463.90 that the members at age 60 will pay. That having been followed through all the ages, we find that one rate of the table will produce $95,950.79; that is the amount that one rate of the table will raise.

Q. The amount $95,950.79 is the amount that would be raised by one rate on the regular Safety Fund certificate.

A. Yes.

Q. Will you please refer to the second column of figures which

appears on the second page of the copy, which will be known as Exhibit 9, and explain what is undertaken to be shown there under the head "Form 3, Men's Division."

A. The same method is used in reaching the total result there and it results in $1,671.37, which is the amount that would be paid by the members having form 3 certificate, on call No. 95, by one rate.

Q. Now, will you refer to age 27 under form 3 and note that the rate of assessment there is 80 cents, whereas under age 27 the rate under the regular Safety Fund certificates is 77 cents, and please explain why a different rate was used as to the form 3 certificates from that which was used in calculating the assessment as to the regular Safety Fund policy.

A. Because the rates differ on the certificates.

Q. The rate under form 3 being higher in every instance than the rate under the regular Safety Fund certificate?

A. Yes.

106 Q. The same is true, is it not, as to age 60. The rate under the form 3 certificates being $3.47 and the rate under the regular Safety Fund certificates being $2.68?

A. It is.

Q. Now, please state whether it is not the fact that the form 3 certificates were the regular Safety Fund certificates which, as explained earlier in the day, carried higher rates?

A. They were.

Q. Now, please refer to the third column of figures, which will be the third page of what will be Exhibit 9, and explain how the assessments are levied with respect to the policies there described as form 4?

A. The same method was used in reaching the amount and determining the amount which would be paid by the form 4 certificates on call 95 as had been used on the two previous sheets.

Q. The rate used with respect to form 4 certificates being the same rate that was used with respect to the form 3 certificates, and being a higher rate than was paid by the regular Safety Fund certificates?

A. It was.

Q. Please state whether or not the form 4 certificates which I understand are the seven-year certificates, were thus assessed by the association until after the expiration of the seven years, enumerated in the face of the policy?

A. No, sir; they were not.

Q. They did not become Safety Fund certificates until after the expiration of seven years?

A. No, sir.

Q. They were then assessed at the rate provided for the form 3 certificates?

A. Yes, they were.

Q. Now, what is the total amount that would be produced by the assessment thus levied at one rate on the form 4 certificates?

A. $2,829.74.

122 George E. Keeney's deposition continued as follows:

Q. Will you please state how recently that table was prepared and under what circumstances—that is to say, how carefully it was prepared.

A. This sheet was prepared since January 1, 1909, and shows the receipts from the members and the amounts paid the Security Company each year, as being absolutely correct with our books.

Q. How was that table prepared so as to insure its accuracy?

A. Taken from the ledgers of the company and checked up.

Q. And by whom was it checked up?

A. By Mr. Hammond, under my direction.

Q. Did the Insurance Department of the State have anything to do with it?

A. It has been gone over by the Insurance Department and their figures are the same as ours; the results arrived at are the same.

Q. You say that this does accurately show the receipts from your members as well as the amounts which you paid to the Security Company year by year?

A. It does.

Q. What is the table which I now hand you, headed table No. 3?

A. This shows the amount which the Security Company has paid the Hartford Life Insurance Company each year from 1886 to 1908 as earnings and accretions from the Safety Fund and the amount which the Hartford Life Insurance Company has credited up to its members in the form of dividends during each of those years.

(Table attached hereto and marked Exhibit No. 27.)

By Mr. Jones: Exhibit No. 27 attached to deposition is introduced in evidence.

123 Said Exhibit No. 27 is as follows:

Table No. 3 gives the amount of income and accretions received each year from the Safety Fund and paid to this Company by the Security Company, the trustee of the fund, and the amount credited to members each year from this source. The totals are as follows:

EXHIBIT NO. 27.

Chas. A. Safford, Notary Public.

Table No. 3.

	Income and accretions rec'd from Security Company.	Credited to members on mortality calls.		Income and accretions rec'd fram Security Company.	Credited to members on mortality calls.
1886	$12,675.44	$12,676.44	1900	$46,795.37	$46,352.13
87	12,082.19	11,976.28	01	54,571.17	54,929.24
88	14,507.58	14,668.72	02	46,633.02	47,697.40
89	16,214.71	16,214.71	03	50,546.03	51,232.07
90	17,328.91	17,328.91	04	42,081.07	40,722.54
91	25,111.60	24,840.35	05	40,869.20	41,464.92
92	29,542.05	29,402.17	06	41,975.96	44,499.00
93	39,589.58	39,909.77	07	39,395.14	42,002.27
94	46,378.02	45,999.24	08	60,286.74	36,730.08
95	95,156.67	95,189.82			
96	84,131.22	84,770.84	Balance Dec. 31, '08	....	$18,960.57
97	70,265.98	69,375.93			
98	79,415.12	79,166.24	To be applied on next call.		
99	71,642.81	71,085.94			
				$1,037,195.58	$1,037,195.58

Total amount of Safety Fund earnings and accretions received from Security Co., from 1880 to December 31, 1908..		$1,037,195.58
Total disbursements, including dividends applied to reduce members' mortuary payments during that time..	$1,018,235.01	
Balance to be applied on next quarterly call..	18,960.57	
	$1,037,195.58	$1,037,195.58

George E. Keeney's deposition continued as follows:

Q. Exhibit 27 is a tabulation of the increment received from the Security Company and the application or distribution thereof, to the members of the safety fund department in the aggregate year by year, is it not?

A. It is.

Q. Please examine the paper which I now show you and tell me what that paper is.

A. This paper shows the amount of dividends which have
124 been paid to Dr. Johnson from the safety fund income and accretions during the life of his policy.

(Paper attached hereto and marked Exhibit 28.)

By Mr. Jones: Exhibit 28 attached to the deposition is introduced in evidence.

Said Exhibit No. 28 is as follows:

DEFENDANT'S EXHIBIT No. 28.

Chas. A. Safford, Notary Pub.

Policy No. 109,854 on the Life of J. T. Johnson, M. D.

Dividends in Reduction of Calls.

Call due.	Amount of dividend.
Sept. 1st, 1895	$5.85
March 1st, 1896	5.25
Sept. 1st, 1896	4.50
March 1st, 1897	4.40
Sept. 1st, 1897	3.40
March 1st, 1898	4.40
Sept. 1st, 1898	3.75
March 1st, 1899	3.75
Sept. 1st, 1899	3.75
March 1st, 1900	2.50
Sept. 1st, 1900	2.50
March 1st, 1900	2.50
Sept. 1st, 1901	3.75
March 1st, 1902	2.85
	$52.75

George E. Keeney's deposition continued as follows:

Q. And the amount paid to Dr. Johnson in each one of the years shown in Exhibit No. 28 is a part of the aggregate of the dividends paid to your members shown year by year in Exhibit No. 27?

A. It is.

Q. On Exhibit No. 6, being the notice of call No. 95, to Dr. John-

son, and in your answer with respect to the way in which that call or assessment No. 95 was levied, there appears a charge of $1.40, being 2 per cent on the amount of the mortuary call originally calculated, and in your answer concerning that you have stated that it was for the taxes assessed upon your premium collections by the State of Missouri. Now I ask you to state whether as a mat-
125 ter of fact you paid a tax on your premium collections to the State of Missouri?

A. We did; we paid them in the year 1902.

Q. Please state if the paper which I now hand you is an original receipt for the taxes paid for that year?

A. It is the original receipt.

Q. That is the original receipt received by you when you paid the taxes in the spring of 1902?

A. It is.

Q. The tax as set forth in the receipt being for the year ending December 31, 1901?

A. Yes.

(Copy of said receipt is attached hereto and marked Exhibit 30.)

By Mr. Jones: Exhibit No. 30 attached to the deposition is introduced in evidence.

Said Exhibit No. 30 is as follows:

DEFENDANT'S EXHIBIT NO. 30.

Chas. A. Safford, N. P.

State of Missouri Treasury.

City of Jefferson, Apr. 7, 1902.

No. 343.
[SEAL.]

Revenue Fund. $1,877.57
County Foreign
Ins. Tax Fund 1,877.58

Total $3,755.15

Received of the Hartford Life Insurance Co. of Hartford, Thirty-seven Hundred Fifty-five and 15-100 Dollars—In full for taxes due the State (on premiums collected in Missouri during the year ending Dec. 31st, 1901), the same being assessed against said Company by the Superintendent of the Insurance Department of the State, in compliance with the requirements of Sections 8043 and 8044 of the Revised Statutes of 1899.

In Testimony Whereof, I have hereunto set my hand and affixed my seal of office the day and year above.

R. P. WILLIAMS, *Treasurer.*
CHAS. L. ELLIOTT, *Chief Clerk.*

(Signed in Duplicate.)

George E. Keeney's deposition continued as follows:

Q. Did your company in 1903 pay a similar tax on its premium collections made during the year 1902, to the State of Missouri?

A. It did.

126 Q. You have not been able, I believe, to find the original receipt for these taxes?

A. We have not.

Q. What are the papers which you now hold in your hand?

A. One is an order from our auditor on the cashier of the company to draw a check for $3,039.13 to the order of R. P. Williams, Treasurer of the State of Missouri, and to charge the same to tax membership. The other is the check which was sent to Mr. Williams and which bears his endorsement as having been received by him and deposited to the Mississippi Valley Trust Company of St. Louis, Mo.

(Copy of said order and check with endorsement thereon is hereto attached and marked Exhibit 31.)

By Mr. Jones: Exhibit No. 31, attached to the deposition, is introduced in evidence.

Said Exhibit No. 31 is as follows:

DEFENDANT'S EXHIBIT No. 31.

Chas. A. Safford, Notary Pub.

Hartford, March 30, 1903.

Safety Fund Check Order.

$3,039.13.

Cashier—Hartford Life Insurance Company:

Please draw check for Thirty Hundred Thirty-nine and 13/100 Dollars for R. P. Williams, Treas., Missouri.

Charge to Tax Membership Acct.

HENRY R. HOVEY, *Auditor.*

2% on $151,956.39.

No. 0059. $3039.13/100

Countersigned,

RAYMOND G. KEENEY, *Treas.*

Hartford Life Insurance Company.

Hartford, Conn., March 31, 1903.

Pay to the order of R. P. Williams, Treas. of Missouri, Three Thousand thirty-nine and 13/100 Dollars.

(Not over Four Thousand $4,000.)

To First National Bank, Hartford, Conn.

GEO. E. KEENEY,
President.

Said check was endorsed as follows:

Pay Mississippi Valley Trust Co., St. Louis, Mo., or order, R. P. Williams, State Treas.

Pay Philadelphia National Bank or order, Mississippi Valley Trust Co. of St. Louis, James E. Buck, Cashier.

Pay to the order of F. P. Furlong, Cashier, Philadelphia National Bank, L. A. Rue, Cashier.

Received payment through Clearing House April 7, 1903, Hartford, Connecticut.

The perforation marked "Paid 4-7-03."

127 George E. Keeney's deposition continued as follows:

Q. In Exhibit No. 20, being a tabulation prepared by the Security Company of the amount of the safety fund on hand at the several dates shown in that exhibit, is a separation or a recital of two amounts, to-wit, amount in the men's safety fund and amount in the women's safety fund. Will you please state whether or not the safety fund in the men's division and the safety fund in the women's division are accumulated pursuant to two separate and distinct safety fund contracts between the Hartford Life Insurance Company and the Security Company?

A. They are.

Q. The contract concerning the safety fund, men's division, appears on the policy issued to Dr. Johnson, being Exhibit No. 2, as well as on the policy issued to Dr. Davison, being Exhibit No. 5, concerning which you have already testified. Please examine the paper which I now hand you and state whether or not it is a copy of safety fund certificate issued in the women's division, together with a copy of the safety fund contract concerning the women's safety fund?

A. It is.

Q. And the copy of the contract concerning the women's safety fund appears on the third page of the paper, does it not?

A. It does.

Q. You are satisfied that it is a correct copy?

A. I know it is.

(Paper attached hereto and marked Exhibit No. 32.)

By Mr. Jones: Exhibit No. 32 attached to the deposition is introduced in evidence.

Said Exhibit No. 32 is as follows:

128 DEFENDANT'S EXHIBIT No. 32.

Chas. A. Safford, Notary Public.

No. — Age —

The Hartford Life and Annuity Insurance Company, Hartford, Connecticut.

Policy—Women's Division. Amount —

In consideration of the representations, agreements, and warranties made in the application herefor, and of the Admission Fee paid; and of the sum of Ten Dollars, on each $1,000 of the Indemnity herein provided for, to be paid to said Company, as herein required, to create a Safety Fund as hereinafter described, and of Three Dollars per annum on each $1,000, for expense Dues, to be paid as hereinafter conditioned, and of the further payment of all Mortality Calls proportioned to the Indemnity herein provided for, levied against the herein named member to form a Mortuary Fund for the payment of all Indemnity matured by deaths of members, which mortality calls, to be levied upon all the members in the division wherein this Certificate is issued whose Certificates are in force at the dates of such deaths, shall be made according to the table of graduated mortality ratios given hereon, and as further determined by their respective ages and the aggregate Indemnity at the dates of such deaths, with due allowance for discontinuance of membership, does hereby issue this Certificate of Membership in the Woman's Division of its Safety Fund Department to.................... (herein called the member) of.....................County of ...., State of ...., with the following agreements:—

That ninety days from the receipt by the President or Secretary of said Company of satisfactory proofs, in accordance with forms furnished upon notice of death and with full information as to the manner and cause, of the death of the herein named member while this Certificate is in force, all the conditions hereof having been conformed to by the member, upon presentation and surrender of this Certificate properly receipted, there shall be due and payable, out of the aforesaid Mortuary Fund and not otherwise, the indemnity of .... Dollars (less the balance unpaid, if any, of the stipulated contribution to said Safety Fund, with fifty per cent. added, together with the unpaid installments of annual expense dues and any mortality or other charge against the member payment of which is not matured,) to..

....

....

legal representatives, or, wholly or in part, to such other person or persons as the member shall direct by a written order delivered to said Company's President or Secretary prior to the decease of the

member, which order shall distinctly set forth to whom and how much shall be so paid. But the member shall have no power thus to dispose of any part of the avails of this Certificate that shall have been legally assigned to any person to secure payment of an actual and provable debt of the member due to such assignee. All such payments to be made at the Home Office of said Company in lawful money of the United States.

That said Company will deposit said sum of Ten Dollars, when received, with the Trustee, named in a contract made with them (of which a copy is printed hereon and made a part of this contract), as a Safety Fund in trust for the uses and purposes expressed in said contract; and shall at the expiration of five years,
129 if said Safety Fund shall then amount to Seventy-Five Thousand Dollars, or whenever thereafter said sum shall be attained, make a semi-annual division of the net interest received therefrom by it, pro rata among all the holders of Certificates in force in said Division at such times, who shall have contributed five years prior to the date of any such division their stipulated proportion of said Fund, by applying the same to the payment of their future dues and assessments; and that, whenever said Fund shall amount to Two Hundred and Fifty Thousand Dollars, all subsequent receipts therefor shall be distributed by the said Company in like manner as the interest. Said Company further agrees that if at any time it shall fail by reason of insufficient membership to collect the necessary sum to make full payment of the maximum amount named in any Certificate issued in said Division, and such Certificate, after demand upon said Company, shall be presented for payment to said Trustee by the legal holder thereof, (within the time herein stipulated for limitation of action), or if a final judgment shall have been obtained in any court of competent jurisdiction upon a claim arising under any such Certificate, satisfaction of which shall have been neglected or refused for the period of sixty days from the decree thereof, then in either of such cases it shall be the duty of said Trustee to at once convert said Safety Fund into money and distribute the same (less the reasonable charges and expenses for the management and safe keeping of said Fund) among the holders of all Certificates then in force in said Division, or their legal representatives, in the proportion which the amount contributed to said Fund upon each of said Certificates shall bear to the whole amount of said Fund; and that in such event it shall file with said Trustee a correct list, under oath, of the names, residences and amounts of the Certificates of all members entitled to participate in such distribution.

And said Company further agrees that so long as any Certificate of Membership in said Division shall remain in force, said Fund shall be in no wise chargeable or liable for any use or purpose except as above mentioned.

And said Company further agrees that the aforesaid Mortuary Fund shall be in no wise chargeable or liable for any use or pur-

poses other than for the settlement of Death Claims, except as herein mentioned.

This Certificate is issued by the Company and accepted by the member upon the express conditions and agreements given elsewhere hereon, and assented to as forming part of this contract.

In witness whereof, The said Hartford Life and Annuity Insurance Company have, by their President and Secretary, signed and delivered this contract, at Hartford, Conn., this . . . . day of . . . . one thousand eight hundred and . . . .

[SEAL.] . . . .,

President.

. . . .

Secretary.

(Ed. Aug. '88.) Agents of the Company are not authorized to make any indorsements on or to vary the terms of this Certificate.

Condition No. 2 "Of Payments," will be so far modified by notices as to allow four days' grace: Increased to fourteen days if resident West of Rocky Mountains.

Annexed is a copy of the Application upon which this Contract is based. Particular attention is invited to it, as this Certificate is issued on the faith of the answers and agreements therein made, which if not correct render it invalid.

130 This certificate is issued by the company and accepted by the member upon the following express conditions and agreements:

1. Application Made Part of Contract.—The application on the faith of which this Certificate issues, together with each and all the several answers, statements, agreements and verification therein contained, is hereby referred to and made a part of this contract; and the exact literal truth of every representation contained in such application as also in each application for reinstatement of this contract shall be a condition precedent to the validity of this contract and of each reinstatement thereof granted in consideration of such representations.

2. Of Payments.—The member agrees to pay to said Company, for expenses, dues of Three Dollars per annum on each $1,000 Indemnity on the first day of the month after date of issue hereof, and at every anniversary thereafter, so long as this Certificate shall remain in force, or by pro rata installments of the same, in advance, for periods of less than a year: And also agrees to pay said Company, within thirty days from day on which notices bear date, all Mortality Calls determined as within set forth; the proceeds of which, less such charges as are herein prescribed and ten cents on each Call for cost of collection, shall form the Mortuary Fund: And further agrees to pay said Company during the first year of membership the sum of Ten Dollars on each $1,000 towards the Safety Fund, either in a single payment on the first day of the month after date of issue, or by pro rata installments thereof, in advance, together with and in the same fractional parts as the first

year's dues are paid; and, while the whole or any portion of such required payments shall remain unpaid, said Company may apply toward payment thereof any unapplied sum standing to the credit of this Certificate: But if the laws of any Country, State, County or Municipality shall require a tax to be paid by said Company on account of such payments, then the mortality calls hereon shall be determined so as to cover such tax; and the proceeds of such mortality calls shall be charged with the member's proportionate share of fees actually paid by the Company for medical examinations made in the first year of the membership hereby granted. All of which payments are to be made directly to the Home Office of said Company, and not to agents, who are unauthorized to receive them.

3. Conditions of Acceptance.—The member further agrees and accepts this Certificate upon the express condition that if either the Annual Dues, Mortality Calls, or Safety Fund Deposit, as hereinbefore required, are not paid to said Company on the day due, then this Certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the Certificate was in force, either from said Company or the Trustee of the Safety Fund: And that failure to make the stipulated payments shall absolutely terminate the member's liability therefor: And that if any final division from said Safety Fund, as hereinbefore provided, shall be made by the Trustee thereof on account of this Certificate; then, and in all such cases, all liability of said Company and of its Safety Fund, on account of this Certificate, shall cease.

4. Incontestability of Contract.—Five years from the date of full payment hereon towards the Safety Fund, or five years from the date of any reinstatement hereof after such full payment, this contract shall be absolutely incontestable, provided that nodefault
131 in respect of time and amount of any of the stipulated payments hereon shall have occurred, (excluding all waiver whatsoever of promptness in payment unless evidenced by extension of time by the Company's Secretary in writing:) Provided also that no understatement of age was made in application herefor; except that in case of such understatement the indemnity recoverable shall nevertheless be such a proportional part only of the whole indemnity named herein as the whole amount of mortality calls paid hereon shall bear to the whole amount of same that should have been paid at the true age; and except further that if the true age at date of application was beyond the age of sixty years then there shall be recoverable only the annual dues and mortality calls paid hereon: And provided further that the occupations prohibited herein shall not be followed without the Secretary's written consent.

5. Giving Notice.—A notice directed to the address of the member, or other person designated by her, appearing at the time on the Company's books, shall be a sufficient notice of any required payment, and a certificate of the Secretary, supported by affidavit of the person whose duty it was to perform the service, of such addressing and of mailing of notice in post-office at Hartford shall be taken

paid death losses at the end of each month, beginning with
118 December 31, 1905, and running down to and including May
31, 1907, and whether the dates referred to appear in the first column, the amount of the mortuary fund under the head "Mortuary Balance" in the second column, and the amount of death losses upon which claims had been made against the company and which had not been paid, appear in the third column under the head "Outstanding Losses"?

A. It does.

(Said paper hereto attached and marked Exhibit 12.)
(Adjourned for lunch until 2 o'clock.)

By Mr. Jones: Exhibit No. 12 attached to the deposition is introduced in evidence.

Said Exhibit No. 12 is as follows:

DEFENDANT'S EXHIBIT No. 12.

Charles A. Safford, Notary Public.

	Mortality balance.	Outstanding losses.
December 31, 1905............	$92,314.90	$143,500.00
January 31, 1906............	55,944.30	199,000.00
February 28, 1906............	107,236.01	179,701.28
March 31, 1906............	163,551.96	168,201.28
April 30, 1906............	77,191.69	206,201.28
May 31, 1906............	84,646.06	186,567.48
June 30, 1906............	123,036.38	157,794.74
July 31, 1906............	87,570.01	183,794.74
August 31, 1906............	92,216.71	136,572.74
September 30, 1906............	202,303.14	148,572.74
October 31, 1906............	109,249.70	123,972.74
November 30, 1906............	145,616.28	165,972.74
December 31, 1906............	152,322.50	148,622.74
January 31, 1907............	99,183.43	197,122.74
February 28, 1907............	115,098.11	208,736.80
March 31, 1907............	178,361.19	215,736.80
April 30, 1907............	79,317.55	188,236.80
May 31, 1907............	133,091.68	177,236.80

George E. Keeney's deposition continued as follows:

Q. Please examine the paper which I now hand you, being letter addressed to the Hartford Life Insurance Company, dated June 19,
1902, signed Garland S. Johnson. Please state whether that
119 letter was received by the Hartford Life Insurance Company
in June, 1902.

A. It was.

(Copy of letter is hereto attached, marked Exhibit 16.)

By Mr. Jones: Exhibit No. 16, attached to the deposition, is introduced in evidence.

Said Exhibit No. 16 is as follows:

EXHIBIT No. 16.

Chas. A. Safford, Notary Pub.

Schell City, Mo., June 19, 1902.

Hartford Life Ins. Co., Hartford, Conn.

GENTLEMEN: My father and I both have been out of town and did not get to attend to payment due on policy 109854, Hartford Life & Annuity Insurance Co., on life of Jas. T. Johnson. I see our time expires to-morrow. What steps can we take now to make payment and have it reinstated. Father is in perfect health. I am very sorry indeed for the delay, but it could not possibly be avoided. Kindly let us know by return mail.

Yours very truly, GARLAND S. JOHNSON.

Geo. E. Keeney's deposition continued as follows:

Q. Who was Mr. E. A. Wright?
A. He was Chief Clerk of the company.
Q. In what year?
A. He has been here for, I think, twelve years.
Q. Is that a copy of letter written in behalf of the company by Mr. Wright June 21, 1902, to Garland S. Johnson in response to Exhibit 16?
A. Yes, it is.

(Letter attached hereto and marked Exhibit 17.)

By Mr. Jones: Exhibit No. 17 attached to the deposition is introduced in evidence.

120 Said Exhibit No. 17 is as follows:

DEFENDANT'S EXHIBIT No. 17.

Chas. A. Safford, Notary Public.

June 24, 1902.

Garland S. Johnson, Schell City, Mo.

DEAR SIR: As you wrote us before the last day of grace expired for payment of the June call, policy, No. 109854 we are warranted in extending the time of payment, and have gvien you until July 5th to renew the policy. If, therefore, you wish to permit us $75.05 on or before that date, the policy will be kept in force.

Yours truly, E. A. WRIGHT,
Chief Clerk.

George E. Keeney's deposition continued as follows:

Q. As a matter of fact the rates from 45 and upwards on the form 3 policies are higher than the rates for the corresponding ages on the regular Safety Fund policies.

A. At 45 exactly the same; from 46 on they are higher.

Q. And running the other way, from age 45 down, they are slightly lower for corresponding ages in the form 3 certificates than they are on the regular Safety Fund certificates?

A. Yes, back to age 32.

Q. Please state whether or not call No. 95 was paid by or for Dr. Johnson to the company?

A. It was not.

Q. I hand you tabulation with respect to the amount received from members for the Safety Fund and the amounts deposited with the Security Company by the Hartford Life Insurance Company for credit to the Safety Fund and get you to state what the paper shows?

A. This paper under table 2 shows every dollar that has ever been received by the Hartford Life Insurance Company from its Safety Fund members as payments toward the Safety Fund and the amount paid by the Company to the Security Company for
121 that purpose. It is given each year—the amount received from members and the amount paid to the Security Company in each year from 1880 to 1908 inclusive.

(Paper attached hereto and marked Exhibit 26.)

By Mr. Jones: Exhibit No. 26 attached to the deposition is introduced in evidence.

Said Exhibit No. 26 is as follows:

Chas. A. Stafford, Notary Public.

Table No. 2 gives the amount which the certificate holders have paid to the Hartford Life Insurance Company to create the Safety Fund, showing the amount paid in each year and also the amount paid annually by this Company to the Security Company, trustee of this fund. The totals are as follows:

Table No. 2.

	Received from members.	Deposited with Security Co.
1893	$59,190.03	$59,170.03
81	4,673.52 45,702.22	45,698.76
82	13,097.07 53,799.48	53,234.94
83	24,873.77 67,112.44	67,586.20
84	17,139.44 52,257.31	52,351.55
85	7,950.86 56,712.22	56,720.31
86	8,902.39 78,537.38	155,166.34
87	86,152.67	86,136.67
88	71,730.30	71,745.32
89	82,075.87	82,075.87
90	96,260.12	96,160.12
91	85,610.56	85,645.65
92	85,053.09	85,037.40

	Received from members.	Deposited with Security Co.
1880	$20,363.52	$20,363.52
94	50,453.70	50,554.30
95	45,688.61	45,688.61
96	33,011.70	30,011.70
97	32,582.68	32,582.68
98	28,296.68	28,296.68
99	22,485.00	22,484.20
1900	17,619.97	17,619.97
01	15,068.39	15,068.39
02	11,206.12	11,206.12
03	7,313.75	7,313.75
04	4,304.04	4,304.04
05	2,074.60	2,074.60
06	796.00	796.00
07	930.00	930.00
08	690.00	691.78
	$1,289,715.50	$1,289,715.50

Total amount paid by members to Safety Fund from 1880 to December 31, 1908.......		$1,289,715.50
Total amount paid to Security Co., Trustee during that time..........	$1,289,715.50	
	$1,289,715.50	$1,289,715.50

That, as often as possible said trustee shall make inve tments of such funds in such securities as the statutes of the state of Connecticut shall permit to be made by life insurance companies,
135 and, provided no default by the party of the first part as hereinbefore recited shall occur, shail accumulate said fund and the income thereof (less the reasonable compensation and expenses), for five years from July 1, 1882, or until such time thereafter as such fund shall amount to seventy-five thousand dollars, par value, of the securities purchased for said fund, and shall pay over to the party of the first part, semi-annually thereafter, ali the further income from said fund (less the accruing and unpaid compensation and expenses), to be by the party of the first part used for the purposes mentioned in the hereinbefore recited agreements. And, unless such defaults shall occur, will thereafter add to the principal of said fund the deposits thereafter received from the party of the first part, exclusive of the income therefrom, until the whole fund shall amount in such securities, at their par vaiue, to two hundred and fifty thousand dollars: And in the event of the failure or neglect mentioned in the hereinbefore recited agreements, will convert said fund into money and distribute the same in accordance therewith as soon thereafter as it can reasonably be done.

All payments required hereby to be made to the party of the first part, to cease upon the aforesaid failure or neglect of the party of the first part; and all payments required herein to be made to the certificate holders by the party of the second part, to be made at the office of said trustee or of the successor in said trust.

The necessary expenses connected with the management of said fund shall be limited to the ordinary commissions for purchasing or selling and transfer or transmission of the hereinbefore mentioned securities, together with the cost of the stationery and postage used in replying to requests for information of the condition of said fund, which replies shall be made by the trustee to any person entitled to request the same by reason of an interest therein, and the actual cost of any judicial action needed to determine the legal status of said fund: All other expense to be included in and covered by such reasonabie charge as shall be made for the compensation of the trusteeship, to be determined by the amount of time and labor involved in the execution thereof.

It is hereby mutually understood and agreed by both parties hereto that all the hereinbefore recited agreements of the party of the first part with the certificate holders shall constitute the uses and purposes of the trust expressed herein. And it is hereby further understood and agreed that at such time as it shall be shown that all certificates of membership issued by the party of the first part in the aforesaid division have been legally settied and surrendered to it, or properly canceled in accordance with their terms, it shall be held and considered that the uses and purposes of said trust have been fully accomplished by said insurance company, and the balance of said fund, if any, shall be paid over to the party of the first part.

And it is further understood and agreed that the securities, investments and moneys composing said fund shall at ail reasonable

times be subject to inspection by the insurance commissioner of the state of Connecticut, and by the proper officers of the insurance departments of all states where certificate holders may be obtained; and to inspection by the party of the first part, who shall keep the party of the second part correctly informed of the names, addresses, numbers and amounts of Certificates of all persons who shall contribute to said fund.

And it is further understood and agreed that if said party of the second part shall, for any cause, fail to perform its duties
136 as such Trustee as hereinbefore specified, or if, by reason of financial embarrassment of the party of the second part, or other cause, it shall be deemed expedient to remove said trust from its hands, then a new Trustee may be appointed, by the mutual nomination of said Insurance Company, and the then Insurance Commissioner of the State of Connecticut, to succeed to said trust, with all the duties and obligations herein imposed upon said original Trustee, and said party of the second part shall surrender said Fund to such successor.

In witness whereof, the party of the first part has affixed hereto the corporate seal of said Company, and caused these presents to be signed by its President and Secretary. And the party of the second part has hereto affixed its corporate seal and its President and Treasurer have hereunto set their hands. Done at Hartford in the State of Connecticut the day and year first above written.

HARTFORD LIFE AND ANNUITY INS. CO.,
[SEAL.] By FREDERICK R. FOSTER, *President*,
AND
STEPHEN BALL, *Secretary*.
SECURITY COMPANY,
[SEAL.] By ROBERT E. DAY, *President*,
AND
WILLIAM L. MATSON, *Treasurer*.

The following appeared on the back of said policy:

Table of Graduated Mortality Ratios for Every $1,000 *of Death Loss on Each* $1,000 *of a Total Indemnity in Force of* $1,000,000.

Age.	Ratio.	Age.	Ratio.	Age.	Ratio.	Age.	Ratio.
15 to 21	$0 65	33	$0 91	44	$1 20	55	$1 92
22	67	34	94	45	1 22	56	2 03
23	69	35	97	46	1 25	57	2 15
24	71	36	1 00	47	1 30	58	2 32
25	73	37	1 03	48	1 35	59	2 50
26	75	38	1 06	49	1 40	60	2 68
27	77	39	1 09	50	1 47	61	2 86
28	79	40	1 12	51	1 54	62	3 08
29	81	41	1 14	52	1 63	63	3 30
30	83	42	1 16	53	1 72	64	3 65
31	85	43	1 18	54	1 81	65	4 00
32	88						

Notes to the Table.

1. These ratios decrease in proportion as the total indemnity in force increases above $1,000,000 in amount, and are calculated so as to cover the stipulated cost of collection.

2. When the total indemnity in force does not exceed $250,000, the ratio is to be four times the tabular ratios given above.

137 3. When the total indemnity in force is less than $1,000,000 and more than $250,000, the maximum ratio given in Note 2 diminishes in exact proportion to the increase of such total indemnity over $250,000.

Remark.—The ratios set forth in Notes 2 and 3 are so calculated as to raise enough from mortality calls, whenever the total indemnity in force exceeds $250,000, to meet death losses up to the maximum limit of benefit named in certificates. The higher ratios thus established will be offset by the occurrence of proportionately fewer death losses on the lesser amounts of total indemnity to which such ratios apply, and are so adjusted that with a smaller indemnity in force the maximum benefit is met with no greater cost for mortality calls over each yearly period of membership than when a larger indemnity is in force.

George E. Keeney's deposition continued as follows:

Q. Please state whether the fund which was accumulated pursuant to the safety fund contract of the women's division, as shown on Exhibit 32, was at all times kept separate and distinct from the safety fund of the men's division?

A. Absolutely, in every instance.

Q. Please state whether the safety fund in the men's division has at any time exceeded the sum of one million dollars in par value of the securities in which that fund was invested.

A. No, sir; it has not.

Q. Please state whether the safety fund of the women's division has at any time exceeded the sum of $250,000 in par value of the securities in which it was invested.

A. It has not.

Q. Please state whether the safety fund of the men's division at all times has been maintained in United States government bonds?

A. It has not.

Q. Please state if the paper which I now hand you is a copy of the Act of the General Assembly of the State of Connecticut approved April 10, 1899?

A. It is.

(Paper attached hereto and marked Exhibit 33.) It is stipulated that no more formal proof of the passage of the act recited in Exhibit 33 need be made in this case, but the copy thereof, being Exhibit 33, shall be sufficient proof of the passage of said act.

138 By Mr. Jones: Exhibit No. 33 attached to the deposition is introduced in evidence.

Said Exhibit No. 33 is as follows:

DEFENDANT'S EXHIBIT NO. 33.

Charles A. Safford, Notary Public.

State of Connecticut,

Office of the Secretary.

General Assembly, January Session, 1889.

(House Joint Resolution No. 176.)

(178.)

Authorizing the Security Company to make Certain Investments of Trust Funds.

Resolved by this Assembly:

That the Security Company, a corporation located in Hartford, be and it is hereby authorized to invest the funds known as the Safety Fund, which it now holds or may hereafter receive from the Hartford Life and Annuity Insurance Company, a corporation also located in said Hartford, under a contract between said companies dated the thirty-first day of December, 1879, in trust for the benefit and security of certain holders of certificates of membership in said Hartford Life and Annuity Insurance Company, in such other securities, in addition to United States bonds, as the life insurance companies of this State are by law authorized to invest in, instead of being compelled to invest all said funds in United States bonds as specified in said contract; provided, such investments of said funds in other securities than United States bonds shall be made with the consent and approval of said Hartford Life and Annuity Insurance Company; and, provided further, that nothing in this resolution shall be so construed as in any way to vary, alter, or change the purposes, conditions, or stipulations of such trust as set forth in said contract, except as to the kind of securities in which the same may be invested.

Approved April 10, 1889.

STATE OF CONNECTICUT,
Office of the Secretary, ss:

I, Charles G. R. Vinal, Secretary of the State of Connecticut, and keeper of the seal thereof, and of the original record of the Acts and Resolutions of the General Assembly of said State, do hereby certify that I have compared the annexed copy of House Joint Resolution No. 176, passed at January Session, 1889, "Authorizing the Security Company to Make Certain Investments of Trust Funds," with the original record of the same now remaining in this office,

and have found the said copy to be correct and complete transcript thereof.

And I further Certify, that the said original record is a public record of the said State of Connecticut now remaining in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said State, at Hartford, this sixth day of September, 1904.

(Signed) CHARLES G. R. VINAL,
Secretary.

139 George E. Keeney's deposition continued:

Q. In what form of securities has the safety fund been invested since the passage of the act, a copy of which is Exhibit 33?

A. In any securities which are legitimate investments for insurance companies under the Connecticut State laws.

Q. And as a matter of fact the investments have been of what character?

A. Largely bonds; some mortgages, real estate mortgages.

Q. Real estate mortgages and bonds?

A. Some railroad stocks.

Q. Of what bonds—I do not mean by that the particular bonds—what character of bonds?

A. We have municipal and railroad bonds, both, but largely, I think, in railroad bonds.

Q. Can you state what has been the result, so far as the income from that fund is concerned, as to the greater or lesser yield by way of earnings for dividends to the members?

A. It has been very much larger under the present investments than if the fund had been continued in United States bonds.

Q. Now will you state why?

A. Since the change of investments from United States bonds to other bonds, the average earnings of the safety fund have been about 5 per cent. If the fund had been continued in United States bonds it would have earned not to exceed 3 per cent, which makes a difference of 2 per cent on the total amount of the fund that has been earned under the present investments, over and above what it would have netted the members if it had been continued in United States bonds.

Q. Do you know whether, as a matter of fact, in 1889, and subsequent thereto, there was a large or small amount of government

140 bonds available and at what premium—whether high or low premium?

A. The premium on government bonds at that time, of the character held in the safety fund, was about 20 per cent.

Q. And very difficult to get, were they not, at that? That is, as a matter of fact, were they available in any considerable quantities?

A. Only at a large premium over their par value.

Q. Now, will you please state how and in what manner the investment of the safety fund after 1889 was made by the Security Com-

pany and what participation, if any, the Hartford Life had in such investment?

A. We had no voice in the investments from 1889 to 1894. From 1894 to the present time all investments made for the safety fund have been made by the Security Company with the written consent and approval of the Hartford Life Insurance Company.

Q. Call No. 95, being the call dated May 2, 1902, was laid, as you have testified, upon the showing of death losses as of April 1, 1902. Can you state the amount of mortuary fund on hand in the men's division at the close of the books of the day preceding April 1, 1902—that is to say, on March 3, 1902?

A. $179,710.78.

Q. And the outstanding death losses on that date were how much?

A. $466,921.

Q. And the amount for which that assessment was levied, Call 95, was how much?

A. $362,500.

Q. Now, the practice of the company being to levy assessments on calls in the safety fund department quarterly, when, according to your course of business, would the next assessment be laid, after call 95?

A. It would be laid on July 1, 1902.

141 Q. And be dated what date?

A. Dated August 1, 1902.

Q. The returns from which would begin to come in about what date?

A. About September 1.

Q. And the bulk of the returns of that call would be received about what date?

A. Between that time and the fifth of September.

Q. So that the amount of mortuary funds on hand in that division on March 31, 1902, being $179,710.78, plus the amount that would be realized on call No. 95, which was made for the sum of $362,500, would have to provide for the death losses on hand and to be anticipated during what period?

A. For the death losses on hand March 31, 1902, and those incurred from that time to September 1, 1902.

Q. And the death losses on hand March 31 were how much?

A. $466,921.

Q. And the average death losses of the men's division of the safety fund department were what?

A. About $100,000 per month.

Q. And your average death losses for the month were about what sum?

A. About $100,000 per month.

Q. Please state whether or not separate and distinct assessments are levied in the women's division for the death losses of that division.

A. They are.

Q. And both the men's division and the women's division are again separate and distinct departments and the funds kept entirely

separate and distinct from the business known as the old line and level premium business of the company?

A. Absolutely.

Q. Referring to Exhibit 30, which is the receipt from the Treasurer of the State of Missouri for taxes, dated April 7, the amount being for taxes on premiums collected during the year 1901, the amount being for $3,755.15 as a total, I wish you would state
142 first whether that receipt included taxes on your premium on the old line business of Missouri and the tax on the assessments collected in the safety fund department.

A. It did.

Q. Now can you tell me how much of that receipt was for taxes on premiums on the old line business and how much for taxes for assessments on the safety fund business?

A. $593.53 was the old line tax; $3,161.62 was the safety fund premium tax.

Q. Now, referring to Exhibit 31, which is the voucher and check for taxes paid to the State of Missouri, the voucher being dated March 30 and check March 31, will you please state whether that check and voucher relates solely to the tax on the assessment in your safety fund department and does not include taxes on the premiums in the old line policy?

A. It relates entirely to the safety fund tax.

Q. And whatever tax was paid on the premiums of the old line business would be represented by a separate check and voucher of the old line department?

A. It would.

Q. Referring again to Exhibit 3, which is Form 4, a seven-year stipulated premium policy, I again call your attention to section 4, which provides that from the payments made during the first seven years certain charges should be deducted, and that the excess, after paying mortality, shall be credited as a dividend upon the eighth and following years; I ask you whether on your stipulated premium policies you did as a matter of fact keep a separate account of the receipts from those policies and the death losses paid on account of those policies, so that the excess or balance on hand could be determined from time to time?

A. We did.

143 Q. Does the paper which I now hand you show, among other things, the amount of such balance under the designation, "stip. prem." (meaning, I take it, stipulated premium) at the end of each year, beginning with December 31, 1900, and ending December 31, 1906?

A. It does.

Q. And state whether it shows the amount to the credit on those several dates in the men's mortuary fund and also in the women's mortuary fund?

A. It does.

Q. And those figures appear in the second or last column to the right of the page of the exhibit under the heading "Company's Books"?

A. They do.

Q. Now, all of the figures in there, to the right of the page, are taken from the company's books at the end of the year during those several years, are they not?

A. They are.

Q. Now, in the column to the left of that page, under the head "Missouri Reports," appear certain figures; I ask you whether those figures are taken from the reports made to the Insurance Department of the State of Missouri?

A. Yes.

Q. And the purpose of this exhibit is to show and explain how the figures to the left, which were taken from the Missouri report, actually appear on the books of the company for those several years?

A. It is.

(Paper attached hereto and marked Exhibit 35.)

By Mr. Jones: Exhibit No. 35 attached to the deposition is introduced in evidence.

Said Exhibit No. 35 is as follows:

DEFENDANT'S EXHIBIT NO. 35.

Chas. A. Safford, Notary Public.

Missouri Reports.			*Company's Books.*		
Dec. 31, 1900	$111,495.36		Men's Mort.	$89,461.38	
	230,220.00		Women's Mort.	21,903.20	
		$341,715.36	Stip. Prem.	228,484.41	
				$339,848.99	
			Error	1,866.37	
					$341,715.36
Dec. 31, 1901	$262,257.00		Men's Mort.	$88,868.99	
	116,313.59		Women's Mort.	43,858.98	
		$378,570.59	Stip. Prem.	224,292.62	
				$357,020.59	
			(Excess of assessments in course of call)	21,550.00	
				$378,570.59	
Dec. 31, 1902	$352,640.92		Men's Mort.	$126,858.76	
			Women's Mort	41,622.73	
			Stip. Prem.	184,159.43	
				$352,640.92	

Dec. 31, 1903	$306,091.99	Men's Mort.		$136,450.23
		Women's Mort.		66,139.79
		Stip. Prem.		101,791.81
		Int. Bank Bal.		1,710.16
				$306,091.99
Dec. 31, 1905	$324,316.26	Men's Mort.		$207,748.77
		Women's Mort.		68,695.14
		Stip. Prem.		46,759.70
		Int. Bank Bal.		1,112.65
				$324,316.26
Dec. 31, 1905	$221,387.35	Men's Mort.		$103,919.88
Women's Mort.	74,881.63	Stip. Prem.		46,508.67
		Int. Bank Bal.		243.84
				$225,554.02
		D. Claims		4,166.67
				$221,387.35
		Men's Mort.		$163,927.48
		Women's Mort.		51,049.84
Dec. 31, 1906	$247,355.23	Stip. Prem.		38,430.30
				$253,407.62
		Death Claims	$4,166.67	
		Div. Overpaymt.	1,885.72	6,052.39
				$247,355.23

and admitted as conclusive evidence of such addressing and mailing and be admitted as conclusive proof of due notice to each and every person interested herein: But if the person addressed as aforesaid shall fail to receive a notice of Mortality Call before the expiration of Two Months from the date on which the last paid Mortality Call fell due nevertheless this contract shall not discontinue if an amount equal to the amount of said last paid Mortality Call shall be transmitted to and received by the Company's Secretary within Ten Days after the expiration of said Two Months. Notices given while any payment that has fallen due hereon shall be unpaid, are to be understood only as notices to reinstate membership and shall not be held to extend maturity of such unpaid payments nor as waiving proof that the member is alive and in good health, certificate of which shall be tendered with all applications for reinstatement; nor shall payments therefor be effective to reinstate membership unless they, together with such health certificate to the Company's satisfaction, shall be received at the Company's Home Office before the member's death.

6. Change of Residence or Address.—In case of change of residence, post-office address, occupation, or name of the member, or other person designated to be notified by Company, the member or such person shall at once give notice thereof in writing to the Secretary of the Company. In case of failure to do so, the Company may proceed for all purposes as if no such change had been made.

7. Prohibitions.—If the member shall be personally engaged in blasting, submarine operations, mining underground, manufacturing poisonous or explosive chemicals, retailing intoxicating beverages, as engineer or fireman on railroad locomotive, or in "braking" or "coupling" on, and "making-up" of, railroad trains, trading or living among savage tribes or nations, or shall be engaged in military service (except in time of peace), or in naval or any marine service, without, in each of these cases, having first obtained the written consent of said Company's Secretary, or shall use alcoholic or narcotic stimulants so as to produce intoxication sufficient to impair health, or to produce delirium tremens, or to cause death; or shall die by self-destruction—whether sane or insane—or while intoxicated, or from effects of drunkenness, or as the result of a
132 duel, or in consequence of keeping or visiting unlawful or disreputable resorts, or while violating or attempting to violate the laws of any nation, state, province or municipality; or if there has been any concealment, misrepresentation or false statement or statement not true made in the application on which this Certificate issues; or if the conditions of this Certificate shall not be in all respects observed and performed by the member to whom this Certificate issues; then, and in all such cases, this Certificate shall be null and void, and of no effect, and no person shall be entitled to damages, or the recovery of any moneys paid hereon.

8. Travel and Residence.—The member herein named is at liberty to travel by railroad, sea, lake, or river, by all trains, first-class steamers and sailing vessels, and to visit or reside, in addition to the residence named in the application herefor, in any portion of the

world where inhabited and civilized, and free from epidemics, wars, or internal dissensions.

9. Limitation of Action.—It is expressly understood and agreed that no action shall be maintained, nor recovery had, for any claim upon or by virtue of this Certificate, after the lapse of one year from the death of said member; and if no suit or proceedings for such recovery be commenced within one year from the date of death of said member it shall be deemed a waiver, on the part of all parties concerned, of all rights or claims under or by virtue of this Certificate, and as conclusive evidence against the validity of such claim, and this certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid hereon. And it is further expressly agreed, in case any suit or proceeding shall be commenced for the recovery of any claim under this Certificate after the lapse of one year from the death of said member, that the person or persons so commencing suit or proceeding shall pay to said Company the sum of two hundred dollars as its reasonable attorney fees and damages, in addition to the taxable costs and allowances in the case.

10. Debts and Liens.—It is further agreed that this Certificate shall be charged with any and all amounts that may be owing from the member or beneficiary herein, or their assigns, to said Company at the time of the payment of this Certificate, and the Company reserves a lien thereon to secure the payment of any such indebtedness, and the right to deduct and withhold the amount of any such account or indebtedness in payment thereof. But nothing herein contained shall be held to constitute a waiver of forfeiture if any of the hereinbefore stipulated payments shall not be paid when due in the manner set forth in the conditions of this Certificate.

11. Assignments.—This Certificate shall not be assigned or transferred, unless notice and copy of the assignment be immediately given to said Company; nor, unless a claim hereunder, made by an assignee, be subject to proof of interest; nor shall such assignee, unless bearing to the member the relationship of husband, child, parent, brother, or sister, receive any benefit therefrom in excess of the value of the interest proven. The Company shall not be responsible for validity of assignments.

12. Powers of Agents.—Agents of the Company cannot alter or waive any of the conditions of this Certificate, nor issue permits of any kind, and they are not authorized to make any indorsements hereon, nor to receive or receipt for money on behalf of this Company other than for Admission Fees, for the receipt of which
133 alone the delivery of this Certificate is acknowledgment. It is
further expressly agreed that if the member shall entrust money to an agent for payment of mortality calls, dues or safety fund deposits the Company shall not be held responsible therefor until all moneys thus entrusted shall have been actually received in the Home Office of the Company before the last day fixed for payment of such moneys shall have passed.

13. The membership in the Women's Division of the Hartford Life and Annuity Insurance Company, evidenced by this Certificate,

is hereby made subject to consolidation with the membership of the Company's safety fund department.

14. Waiver of Conditions.—Alteration of the conditions of this Certificate or waiver of forfeiture thereof shall not be effective unless made in writing, signed by the Company's president or secretary.

15. This contract shall not go into effect until delivered to the member or designated beneficiary within the lifetime and good health of the member, nor, if delivered while any part of the payments required by its terms shall be past due and unpaid at the Company's home office.

Trustees' Contract.

This agreement, made and entered into this thirtieth day of June, A. D. 1882, by and between the Hartford Life and Annuity Insurance Company, a corporation organized under the laws of the state of Connecticut, and located in the city of Hartford in said state, party of the first part; and the Security Company, a like corporation, also located at said Hartford, party of the second part; Witnesseth:

Whereas, The party of the first part purposes to issue to persons contracting therefor, Certificates of membership in a special department of its business to be known as the Women's Division of the safety fund system, and, in consideration of the sum of ten dollars to be received on each one thousand dollars of the amount of each and every such Certificate for the purpose of creating a safety fund in connection therewith, to enter into sundry agreements with such persons in the following words, to wit:

"That said Company will deposit said sum of ten dollars, when"
"received, with the Trustee, named in a contract made with them"
"(of which a copy is printed hereon and made a part of this con-"
"tract), as a safety fund in trust for the uses and purposes ex-"
"pressed in said contract; and shall at the expiration of five years"
"from July 1, 1882, if said safety fund shall then amount to sev-"
"enty-five thousand dollars, or whenever thereafter said sum shall"
"be attained, make a semi-annual distribution of the net interest"
"received therefrom by it, pro rata among all the holders of Cer-"
"tificates in force in said division at such times, who shall have"
"contributed five years prior to the date of any such division their"
"stipulated proportion of said fund, by applying the same to the"
"payment of their future dues and assessments; and that, when-"
"ever said fund shall amount to two hundred and fifty thousand"
"dollars, all subsequent receipts therefor shall be distributed by the"
"said Company in like manner as the interest."

"Said Company further agrees that if at any time, after said"
"fund shall have amounted to seventy-five thousand dollars, or after"
"five years from January 1, 1883, if that amount shall not have"
"been attained before the expiration of that period, it shall fail by"
"reason of insufficient membership to collect the necessary"
134 "sum by assessment to make full payment of the maximum"
"amount named in any Certificate issued in said division,"
"and such Certificate, after demand upon said Company, shall be"

"presented for payment to said Trustee by the legal holder thereof" "(within the time herein stipulated for limitation of action), or, if" "after the expiration of said period, a final judgment shall have" "been obtained in any court of competent jurisdiction upon a claim" "arising under any such Certificate, satisfaction of which shall have" "been neglected or refused for the period of sixty days from the" "decree thereof, then in either of such cases it shall be the duty of" "said trustee to at once convert said safety fund into money and dis-" "tribute the same (less the reasonable charges and expenses for the" "management and safe keeping of said fund) among the holders" "of all Certificates then in force in said division, or their legal rep-" "resentatives, in the proportion which the amount contributed to" "said fund upon each of said Certificates shall bear to the whole" "amount of said fund; and that in such event it shall file with said" "Trustee a correct list, under oath, of the names, residences and" "amounts of the Certificates of all members entitled to participate" "in such distribution."

"And said Company further agrees that so long as any Certifi-" "cate of membership in said division shall remain in force, said" "fund shall be in no wise chargeable or liable for any use or pur-" "pose except as above mentioned."

Now, therefore, the party of the first part, in consideration of the covenants and agreements hereinafter contained on the part of the party of the second part and in accordance with its agreement with its Certificate holders, as hereinbefore recited, does hereby appoint the party of the second part trustee as aforesaid and covenants and agrees with them and their successors in said trust to deposit with said trustee, as soon as received, the sum of ten dollars on each thousand dollars of the amount of each and every certificate of membership issued by it in the aforesaid division until said fund shall amount to two hundred and fifty thousand dollars, to be by said trustee held in trust and accumulated as hereinafter agreed, and the income thereof, less the reasonable compensation and expense of said trust, to be paid over to the party of the first part, as hereafter provided, to be used by the party of the first part in accordance with the hereinbefore recited agreements: And when said trustee shall pay the income, as above, to the party of the first part, or, shall make any other payments from said fund, as required by the terms hereof, the liability of said trustee on the amount so paid shall cease; it being understood and agreed that said fund belongs to the party of the first part subject to the expressed trusts herein provided.

And the party of the second part, for themselves and their successors, in consideration of such deposits and of a reasonable compensation for their services, and the necessary expenses of managing said trust, covenants and agrees with the party of the first part and its successors and with each of the holders of the aforesaid Certificates that they will receive, hold, manage and dispose of all said deposits made with them by the party of the first part, principal and income, in accordance with the uses and purposes specified in the hereinbefore recited agreements of the party of the first part with its Certificate holders.

on Exhibit 35): Item under December 31, 1906, reads "Death claims, $4,166.57," and the item under December 31, 1907, reads "Death claims, $1,166.67."

A. Those represent death claims which had been assessed for previous to those dates, but which had not actually been paid.

Q. Now, can you say why they had not been paid?

A. They represent death claims which were either in
150 litigation, or where there were disputes between claimants for the fund, or where the beneficiary could not be found, or for some other reason the company was unable to make the payment; consequently, in determining the balance in these respective funds, the amounts are charged, on the exhibit, against the money otherwise in the respective funds.

Q. You have said that the money was received from the Security Company semiannually and applied by you as dividends to policy holders semiannually. I want you to state whether or not it has been so received and so applied in each of the years which we have had under consideration here, down to and including 1907?

A. It has.

Q. Has any part of those sums received from the Security Company been retained by the company?

A. No, sir.

Q. But all of it has been and is being applied in distribution of dividends to members?

A. It has.

Q. General, in the insurance reports made to the Insurance Department of the State of Missouri appears from time to time an item designated "Net safety funds in Security Co.," the amount, of course, varying each year. I wish you would state whether the item as thus reported included both the men's and women's safety fund, at their market value, with the accruing interest on both of these funds and the income account of both of these funds.

A. They do.

Q. The figures which you have given here with respect to the safety fund undertakes to give simply the amounts in the safety fund of the men's division?

A. That is all.

Q. Except in the exhibit testified to by Mr. Bunce, which
151 undertakes to show distribution of both the men's and the women's funds?

A. It does.

Q. Now, with regard to the ratio or percentage of lapse which was assumed when the assessment or assessments were called in these cases—were made; I understand it to be the fact that whatever was realized upon those calls went into the mortuary fund.

A. Every dollar received went into the mortuary fund.

Q. And the death losses of the safety fund department were paid from the mortuary fund?

A. In every instance.

Q. So that if the ratio or percentage of lapse was less than that

which was assumed in making the assessment, the excess, whatever it was, went into the mortuary fund?

A. It did.

Q. And was eventually used, or stands ready to be used, for the payment of death losses?

A. It does.

Q. And the assumption of a greater ratio of lapse on a particular assessment simply operates to reduce the amount that would have to be called on future assessments?

A. It does.

Before closing cross-examination I wish to reserve the right to interrogate the witness on anything I may have inadvertently overlooked, and in closing I want to say to the gentlemen on the other side that any and all information we can possibly furnish of good faith, either from the records or from the witnesses in the company or elsewhere, we stand ready to furnish.

Cross-examination.

By Mr. Rosenberger:

Q. I observe that the Hartford Life Insurance Company was incorporated in the year 1866 by an act of the General Assembly of Connecticut; that is correct, is it not?

A. It is.

152 Q. It was incorporated as a stock company, was it not?

A. It was.

Q. It has always been a stock company?

A. It has.

Q. Its capital stock was originally $200,000, was it not?

A. Its original capital stock was $200,000, with the right to increase that capital stock to a sum not exceeding $1,000,000.

Q. Was the capital stock of your insurance company ever increased, and if so to what amount?

A. I can not state accurately without going to the books of the company, but my impression is that the capital stock was at one time increased to $300,000 and later reduced to $250,000, and afterwards increased to $500,000.

Q. What is the capital stock of your insurance company at this time?

A. $500,000.

Q. How long has it been $500,000?

A. Since 1900.

Q. According to its by-laws, what officers has the Hartford Life Insurance Company?

A. President, vice-president, secretary.

Q. I hand you this pamphlet and ask you to state whether it contains the by-laws of the corporation, the Hartford Life Insurance Company, now in force and in force from the time of its corporate existence?

A. It is a copy of those by-laws.

(We offer these by-laws in evidence in connection with cross-examination, as Defendant's Exhibit 36.)

By Mr. Parks: Plaintiff introduces in evidence Defendant's Exhibit No. 36.

Said Exhibit No. 36 is as follows:

153 EXHIBIT No. 36.

Charles A. Safford, Notary Public.

By-laws of the Hartford Life Insurance Company, formerly Hartford Life and Annuity Insurance Company, of Hartford, Connecticut.

Section 1. The number of Directors shall not be less than seven, nor more than seventeen, as shall, from time to time, be determined by the stockholders in annual meeting or in any meeting legally convened for the choice of Directors; and the Directors shall have full power to exercise all the corporate powers conferred upon the Company by the Charter and any amendments thereof, excepting as shall be otherwise determined by the By-Laws or Resolutions of the Company.

Section 2. The Directors, at their first meeting after their election, or at some adjournment thereof, shall choose, by ballot, a President, Vice-President, and a Secretary; and they shall, at said meeting, or at some subsequent meeting, choose a Committee of Finance, who may invest the funds of the Company.

Section 3. Three Directors shall constitute a quorum for transacting the ordinary business of the Corporation, but in purchasing or selling real estate exceeding in value $5,000, and in making loans exceeding $20,000, not less than a majority of the Board of Directors shall be a quorum.

Section 4. The Directors may hold board meetings at such times as they shall themselves determine; and the President, and, in his absence, the Vice-President, may convene the Board whenever it shall by them be deemed advisable.

Section 5. The Secretary of the Company shall keep the records of the doings of the Corporation and of the Board of Directors, which records shall be subject to the examination of any stockholder requesting the same during business hours.

Section 6. The capital stock of the Company shall be transferred only at the office of said Company, on the books of the Company, prepared and kept for that purpose, and in every transfer of stock the outstanding certificate shall be surrendered to the Secretary, except in case of loss, when a bond of indemnity shall be executed to the satisfaction of the Board of Directors.

Section 7. The annual meeting of this Corporation shall be held on the second Tuesday in May, in each year (in accordance with the provisions of the Charter.)

Section 8. It is hereby made the duty of the President and

Directors to call special meetings of the Stockholders,
154 upon the written request of the Stockholders holding a majority of the stock; and to give notice thereof by at least ten days' publication, previous to such meeting, in two or more newspapers printed in Hartford, such call and notice to state the object of the meeting.

Section 9. The Directors are hereby empowered and instructed in behalf of the Company, from time to time to regulate and to prosecute, in all respects as they shall deem best, the business authorized by the Charter, all amendments thereto, and the General Statutes of the State of Connecticut, to the full extent of the powers conferred thereby upon this Corporation; and they may authorize the President and Secretary to appoint under the seal of the Company attorneys to accept service upon it, agents for the transaction of its business, and Local Boards for advisory purposes, composed of holders of its contracts.

Section 10. These By-Laws may be altered, amended, or repealed, by the Stockholders, at any annual meeting, or at any special meeting warned for that purpose, by a major vote of the Stock represented at such meeting.

George E. Keeney's deposition continued as follows:

Q. I notice from the charter of the defendant company that it is authorized to engage in the business of life insurance, also in accident insurance; that is correct, is it not?

A. That is correct.

Q. To what class of business, if any, was the business of the defendant company confined prior to its embarkation in the business of writing these safety fund policies?

A. Level premiums, legal, reserve business.

Q. And it has continued to write level premium and legal reserve business throughout its corporate history, has it not?

A. No, sir; it has not.

Q. Is it writing such business now?

A. It is.

Q. When did it commence to do that?

A. It wrote legal reserve business previous to 1880. From 1880 to 1899 it wrote so-called safety fund business entirely. From 1899 to the present time it has written legal reserve business entirely.

Q. Will you please state how much insurance of legal reserve has been issued by the defendant company in force on December
155 31, 1879?

A. The amount on December 31, 1879, was $2,868,531.21.

Q. Do I correctly understand you to testify that from some time in 1880, when you began to issue certificates in your safety fund department, until the year 1899, the business written by the defendant company was exclusively in its safety fund department?

A. It was.

Q. It is also true, is it not, that when the defendant company in 1880 began writing safety fund certificates the legal reserve business

which had been written by the company prior to that time was continued in force by the company?

A. It was.

Q. So that the operations of the company in its two departments continued side by side?

A. Absolutely independent of each other.

Q. Did the same clerical force which handled the business of the safety fund department handle the business of the legal reserve policy holders?

A. It did not.

Q. What was the practice of the company in that respect?

A. Certain clerks in the office had charge of the different departments—performed duties of the different departments. Certain clerks had charge of the safety fund business and others had charge and cared for the business of the legal reserve.

Q. Were there [illegible] occasions whatever upon which the clerks handling the business in the legal reserve department in any way participated in handling the business of the safety fund department?

A. That might be possible, but not as a regular duty.

Q. Now, then, in 1899 the defendant company resumed the business of writing legal reserve insurance, or what is popularly known as old line insurance?

A. It did.

156 Q. And in that connection entered the field of competition actively for that class of business?

A. It did.

Q. And the resuming by the defendant company of legal reserve business was coincident in point of time with the cessation of the efforts of the company to write the business in the safety fund department?

A. It was. We are not permitted to write both classes of insurance at the same time.

Q. Upon what do you base your opinion that you are not permitted to write the two classes of insurance at the same time?

A. In some states it is prohibited by law. In our state the department will not license a company to do both assessment and legal reserve business at the same time.

Q. Notwithstanding you say there was a complete separation, as a matter of accounting between the two classes of business in your office?

A. Absolutely.

Q. Will you please state how much insurance of legal reserve plan issued by the defendant company was in force on December 31, 1898?

A. $406,130.

Q. Will you please prepare a tabulation showing as of December 31 of each year the amount of legal reserve business in force by the defendant company in each year, commencing with the year 1898 and extending down to the present time?

A. December 31, 1899, $5,156,405.
December 31, 1900, 14,219,553.
December 31, 1901, 16,114,930.

December 31, 1902, 19,408,249.
December 31, 1903, 24,551,474.
December 31, 1904, 23,849,353.
December 31, 1905, 18,931,951.
December 31, 1906, 18,778,635.
December 31, 1907, 19,998,640.
December 31, 1908, 19,412,710.

157 Q. Up to the year 1905 there was a very rapid increase in the growth of your legal reserve business, was there not?

A. There was.

Q. After 1905 and during a part of that year that business to some extent decreased?

A. I think it was in 1905 that we turned over to the Metropolitan all of our industrial business which was in that department, which, as I remember it, was six or seven million dollars, which, of course, reduced the amount in force that much during that year.

Q. The subsidence of your legal reserve business in 1905 was also coincident in point of time with the general reform movement in life insurance, was it not, which affected the volume of business transacted by all companies?

A. In a measure, yes; that was not the cause of that large decline.

Q. But the business of all life insurance companies was materially influenced by the disclosures in the investigations made by Governor Hughes in the State of New York?

A. In a measure it was, but that had very little effect on any Connecticut company. I do not think there was any company in Connecticut that suffered from that investigation.

Q. I observe on your tabulation, December 31, 1903, your legal reserve or old line business had so far increased in volume that it had amounted, in round numbers to $24,000,000 insurance in force. You may state how much insurance you at that time had in force in your safety fund department.

A. $47,483,050.

Q. And the solicitation of new business in your safety fund department had ceased in the year 1899?

A. It had.

Q. So that since the year 1899 the operations of the defendant company in both its safety fund department and in the writ-
158 ing of old line insurance have been conducted by it side by side in the same office and with the same set of general employes and officers?

A. All our business, both safety fund and legal reserve, is cared for in the home office of the company. Certain employes care for the safety fund business and other employes care for the legal reserve business. The officers of the company have general charge of the business in both departments.

Q. What did that figure of two million and some odd dollars represent?

A. The amount of legal reserve business in force December 31, 1879.

Q. Prior to the year 1899, during the period from 1879 to December 31, 1898, the defendant company also conducted the business

incident to the legal reserve business which had been written prior to 1880?

A. It did.

Q. And those operations of the company were conducted in the same office and with the same staff of general officers or executive officers, side by side with the safety fund business?

A. They were.

Q. I observe that the policy issued to Dr. W. A. Davison, one of the policies in suit, is entitled "Certificate of Membership, Safety Fund Department, Hartford Life and Annuity Insurance Company," and that the insured in that policy is referred to as a member; also that in your testimony you have frequently referred to Dr. Davison and Dr. Johnson as having been members. You may state of what Dr. Davison and Dr. Johnson were members.

A. They were members of the safety fund department of the Hartford Life and Annuity Insurance Company.

Q. They were not members of your joint stock corporation?

A. We do not have any members of joint stock corporations.

159 Q. They were not stockholders of your corporation?

A. No, sir; they were not.

Q. Did they by any form of contract have any right to participate in the management of the company?

A. Not the slightest.

Q. Did they, by virtue of their policy or any other form of contract ever issued to them, if any, participate in the profits of the defendant company?

A. They did not participate in the profits of the company other than in the saving in the mortality of the safety fund membership and the income and accretions from the safety fund.

Q. Under the trust agreement with the Security Company, endorsed on the back of the policies, the company itself has no interest in the safety fund, has it?

A. I will submit the contract as my answer.

Q. What I am referring to, General, are the profits of the defendant company as a company, and will ask you to state whether the persons holding certificates of membership, so called, in the safety fund department in any way participate in the earnings or profits of the company as such?

A. They do not.

Q. In point of actual fact the safety fund department of the defendant company is a mere name by which you designate that feature of its business, involving the issuance of safety fund certificates, the payment of losses to persons holding such certificates, and the ordinary business incident to carrying out those contracts, and arises from the fact that in the conduct by the defendant company of all of its operations, both legal reserve and in the safety fund department, there is a complete separation in the matter of account between the safety fund business and all other sources of business transacted by your company?

A. It is not a mere name. It is an absolute separation of
160 the business in the safety fund department from all other
business of the Hartford Life Insurance Company, and is a distinct department by itself. All accounts in this department are kept absolutely distinct and separate from all other accounts of the company. The Hartford Life Insurance Company in no way profits from the conduct of its safety fund department further than the income which it receives from the dues paid annually by members and other payments for expenses.

Q. And so far as the relation between the defendant company and the holders of certificates in the safety fund department is concerned, that relation is determined solely and exclusively by the terms of the contracts or certificates issued to the holders thereof by the defendant company?

A. It is.

Q. So that in actual fact the persons insured by your safety fund certificates are holders of contracts issued by the defendant company and are not members of the defendant company?

A. They are not.

Q. There have been introduced and attached as exhibits to your deposition on direct examination several different forms of contracts issued to persons insured in your safety fund department, namely, Exhibit 2, of your issue of August, 1888, the Johnson form; Exhibit 3, referred to in the evidence as Form 4; Exhibit 4, referred to as Form 3, and Exhibit 5, being a copy of the certificate issued to Dr. Davison. Those forms of contract are not the only forms of contract issued to persons insured in your safety fund department, are they?

A. I presume there have been some thirty-five editions of safety fund policies that in some minor matters differ from others. As I understand the situation, the reason for the introduction of these particular forms is because of a difference in rate on the pol-
161 icies as between Dr. Davison's and Dr. Johnson's policy, or
the edition of 1888, and the Form 3, and the fact that the Form 4's carried a level premium rate for the first seven years of their existence. There are no policies in the safety fund department that materially differ or that differ so much that the company classes them aside from other policies in the collection of its mortality calls.

Q. But as I understand your testimony, there has been issued from time to time since the company began transacting its safety fund business some thirty-five different editions of policy forms, insuring persons in the safety fund department, and that these editions differ in some respects.

A. Slightly in conditions.

Q. And in your judgment the difference in the terms and conditions of the various policy forms issued to the number of about thirty-five, as you state, to persons insured in the safety fund department were so slight that in making assessments the company did not recognize any difference between those forms as distinguished from forms

issued subsequent to 1894, when the revised rate schedule was adopted?

A. It did not.

Q. Have you any objection to producing all forms of certificates issued by you to persons at any time insured in the safety fund department?

A. We will produce any of which we have copies. Many of these forms are extinct and we have no copies.

Q. You may state whether you, in levying assessments on calls No. 95 and No. 113, and all other assessment calls, have treated all these thirty-five forms of certificates of membership issued to persons insured in the safety fund department as coming within one
162 of the three classes indicated in the tabulation of the assessment, being Exhibits 9 and 18.

A. We have.

Q. You have testified, as I recall it, that in levying assessment No. 113 you divided all persons insured in your safety fund department into three groups or classes, and, as I understand you, the first group was made up of what you on your assessment schedule call "regular assessment policies," the second group made up of policyholders holding your Form 3 contract, the third group made up of your policyholders holding your Form 4 contract and who have persisted in membership for the seven-year period mentioned in the Form 4 contract?

A. Your understanding is correct.

Q. Now, this Form 3 contract (Exhibit 4) was the contract issued in accordance with the revised table of assessment rates adopted for new members entering in 1894 and thereafter, was it not?

A. It was.

Q. And this Form 4 contract (Exhibit 3) was the contract which called for level premiums for a period of seven years and for the conversion of such memberships thereafter into regular assessment members in the safety fund department?

A. It was.

Q. And all persons holding all other forms of contract in your safety fund department, exclusive of Forms 3 and 4, were for assessment purposes put by you into one class or group?

A. They were.

Q. And this was done by you regardless of any variations, whatever they might be, in the terms and conditions of the contract?

A. It was.

Q. This general class or group, excluding the group holding Form 3 contract, and the group holding Form 4 contract, constitute by far the major portion of the body of the membership in the safety fund?

A. They were the larger portion of the membership.

163 Q. How many different forms of contracts, differing in some respect in their terms and conditions, were held by persons composing that class or group of certificate holders not holding Forms 3 and 4?

A. Perhaps twenty or more; there is no way that I can tell accurately, many of the forms being out of existence.

Q. Did you pursue the same method and practice in making assessment call No. 95 as you pursued in making assessment call No. 113?

A. The method used was the same in both cases.

Q. Was it not the practice of yourself, as one of the executive officers of the company, to include in each assessment all deaths and death claims which had been approved up to the time the assessment was laid?

A. Not in every instance.

Q. Why not?

A. Well, there are a great many reasons why a few of those claims would be held up for further investigation.

Q. I am referring only to such claims as had been presented and which had been established against the company to your satisfaction.

A. Those were all included.

Q. In other words, you did not make any distinction in the mortality between the different groups?

A. We did not.

Q. And you reached the amount of the assessment under the same general method as you have described in the case of the Davison call?

A. We did.

Q. From what source did you derive the funds to pay the difference between the amount received between the dates mentioned and the amount of death losses?

A. Death losses are paid from the mortuary fund and the proceeds of the assessment are paid into the mortuary fund, and the money so received went into the mortuary fund with the then exist-
164 ing balance and the death losses paid, if in excess of $260,000, were paid from the fund thus constituted.

Q. Then, if I understand you, death losses are not paid by you out of the moneys realized on any particular call, but are paid out of the mortuary fund?

A. That is true. The funds received each day from assessments as levied are placed day by day into the mortuary fund.

(It is stipulated between the plaintiff, Nannie M. Johnson, and the defendant, the Hartford Life Insurance Company, that the notices, copies of which are Exhibits 6 and 7 in this deposition, were duly mailed to Dr. J. T. Johnson on the dates that said notices bear date, at Hartford, Conn., and that the same were received by Dr. J. T. Johnson in due course of mail, which is two days.)

Q. Do you want to be understood as testifying that the records of the defendant company are in such condition that you are unable to determine the amount produced by any particular call?

A. The cash books of the company will not show in the daily receipts the exact amounts received on different assessments, as cash is coming in each day on more than one assessment. The only method by which the exact amount received by the company on any particular assessment could be determined would be to examine the

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Dec. 31, 1907	$321,368.94	Men's Mort.		$224,392.04
		Women's Mort.		65,398.70
		Stip. Prem.		37,278.07
				$327,068.81
		Death Claims	$1,166.67	
		Div. Overpaymt.	4,533.20	
				5,699.87
				$321,368.94

145 George E. Keeney's deposition continued as follows:

Q. Now that exhibit, General, shows all of the funds in the possession of the company at those particular dates held for or on account of either the stipulated premium contracts, the mortality or other funds for the men's division of the safety fund department, or the mortality or other funds held for the women's department?

A. They do.

Q. Except as there stated, the company had no other funds for any of those policies?

A. None whatever.

Q. And the exhibit is intended to explain and set out in detail what was included in the reports under the head of "Reserve" on safety fund policies?

A. It does, absolutely.

Subject to any and all objections for competency, relevancy and materiality, it is stipulated between counsel that the reports hereinafter specified, made by the defendant company to the State of Missouri, may be introduced in evidence and that in lieu of the production of the original reports on file with the Insurance Department of the State of Missouri, or copies thereof, the plaintiffs in either of these cases may, subject to any other objections that may be urged by the defendant, introduce the printed copies of such reports of the Hartford Life Insurance Company to the Insurance Commissioners for the several years beginning 1901 and ending 1908, which said published reports contain the reports made by the Hartford Life Insurance Company to the State of Missouri for the year ending 1900 and continuing down to and including the year 1907.

Q. General, it is a fact that this stipulated premium, seven year contracts, providing as they do for a fixed charge during the first seven years, are capable of having determined as to each policy the actual legal reserve applicable to such individual policies, and by the accretion thereof the exact legal reserve applicable
146 to them as a whole, but I understand that the accumulations which you have set forth in Exhibit 35 include not only that legal reserve, whatever it is, but also all the other accumulations on those policies, being the difference between the amount paid out on account of those policies and the amount received at the several dates by way of premium payments on those policies?

A. We were obliged to carry a legal seven-year term reserve on those policies. That reserve is a part of the sum shown on that Exhibit 35; the balance is the accumulations that would come from the premiums paid less the death losses that were incurred on those particular policies.

Q. Now, please state whether the company at any time undertook to maintain any reserve on the regular safety fund policies?

A. There never has been any reserve on those policies and the company has never maintained any. There can be none, as they are post-mortem contracts.

Q. Referring to Exhibit 20, which is the tabulation concerning which Mr. Bunce of the Security Company testified about yesterday, I wish you would state what became of the contributions made by the members of the safety fund department of the Hartford Life Insurance Company after the time when the safety fund in the Security Company reached $1,000,000, par value?

A. Every dollar of contributions to the safety fund from the beginning of the business to the present time has been paid to the Security Company, both before and after the fund reached $1,000,000.

Q. After the fund reached $1,000,000 what was done by the Security Company with the contributions made by the members of the safety fund department which you paid to the
147 Security Company?

A. They were paid back to the Hartford Life Insurance Company.

Q. Were the earnings and income from that fund always paid back to the company after it reached $1,000,000 as well as before?

A. They were.

Q. When and how did the contributions made by the members to the safety fund after the safety fund reached $1,000,000, par value of the securities in which it was vested, come back to the Hartford Life Insurance Company from the Security Company?

A. It came back to us as a part of the earnings from the fund to be applied in dividends to our policy holders semi-annually.

Q. When you say they came back as a part of the earnings of the fund, you mean they came back with the earnings of the fund and they came back semi-annually?

A. Yes.

Q. What was done with those amounts that came back to you from the Security Company—how were they applied?

A. They were credited on the mortality payments of the members on the calls made on January 1 and July 1 of each year.

Q. Please state whether or not it is a fact that when the fund came back as you have stated semiannually it was apportioned to each of the policy holders in the safety fund department and applied on his call?

A. It was apportioned and applied to the calls of all members who were entitled to participate in the dividends at the time the call was made.

Q. And those who were not entitled to participate in the dividend or distribution of that fund were such members as had not completed their contribution to the safety fund five years prior to the time of the contribution?

A. They were.

148 Q. The conditions upon which members are entitled to participate in that dividend being set out in their contracts?

A. It is.

Q. I call your attention to two items on Exhibit 35 appearing under the date of December 31, 1906, reading "Dividend, over payment, $1,855.72," and under date of December 31, 1907, "Dividend,

over payment, $4,533.20." Will you please explain what those items were?

A. That is a debit balance on the dividend account. It indicates that we had credited that much more to the members than we had received from the Security Company at that particular date.

Q. Please explain how those items arise.

A. They are a debit balance on the dividend account, caused by the fact that the company apportion to each policy holder entitled to participate, an even sum, a multiple of 5, whereas otherwise the amount to be apportioned would give each member an odd sum, and in this way from time to time the company would pay a sum in excess of the amount which at that time was apportionable as dividends which would be regulated by the next payment to the company by the Security Company. At other times the company would pay out a less sum than was actually apportionable as dividends, which would be taken up and apportioned by the company with the next distribution of the fund received from the Security Company.

Q. Were the dividends apportionable to the members as credits upon their calls at regular intervals?

A. They were.

Q. And how often did you apportion those dividends?

A. Semiannually.

Q. And on what calls?

A. On the call issued January 1 and July 1 of each year.

149 Q. And would be actually applied in the reduction of those calls when they were paid by the members?

A. They would.

Q. So that the actual application of those safety funds which was shown there under date of December 31, 1905, and December 31, 1907, would be applied on calls that were payable to the company February 1 in those years 1906 and 1907?

A. February 1, 1907, and February 1, 1908.

Q. And by the term "application," of course, I mean the adjustment of that dividend to the calls due to the members?

A. That would be it, yes.

Q. Now please state whether those balances as to the dividend account would include the amount apportioned to a member applicable in reduction of his future call, on the payment of that call, where the member had not actually paid the subsequent calls?

A. Whatever amount was credited to members who do not pay their assessments either for lapse or other cause remains as a balance in the dividend fund to be applied at the next dividend application.

Q. And it is so applied?

A. It is always.

Q. To the members?

A. To the members.

Q. And does not revert to the company?

A. No.

Q. I wish you would also explain the items under date of December 31, 1906, and December 31, 1907, reading as follows (as appears

certificate registers and take from the amount received from each individual certificate holder on each assessment that had been laid.

Q. And how many certificate holders are there at this time, approximately?

A. About 15,000.

Q. How many were there, approximately, at the time call 95 was laid, in 1902?

A. About 25,000.

165 Q. How many were there, approximately, at the time call 113 was laid, December 31, 1906?

A. 19,539.

Q. So that, in order to determine how much money was produced by call 113 or by call 95, it would be necessary for you to examine the individual accounts of all those thousands of policy holders?

A. It would.

Q. That would require a very long and tedious examination, would it not?

A. It would.

Q. How long do you estimate it would take to make that examination of your accounts from the records?

A. Several weeks.

Q. Have you ever made such an investigation?

A. We never have.

Q. Have you ever made it in respect to any call?

A. We have not.

Q. You not having made such an examination, how were you able to estimate or determine the lapsation anticipated on any particular call?

A. That is done in the actuarial department of the company and is an entirely different matter from any money consideration. It is taken on the amount of business that may be in force at any particular time, and the schedules used in the actuarial department are revised each quarter for actuarial purposes. Whenever a policy holder lapses he is so marked on the register of the company and his card is also marked as lapsed. These cards are gone over by the actuarial department each quarter and any certificates that have been lapsed are deducted from the amount of business in force for each age, for the laying of the following assessment, and that is the method by which the actual percentage of lapse is determined.

Q. So, in other words, all persons who have lapsed in each quarter are indicated by eliminating them from your current list of
166 policy holders, segregating the lapsed policy holders from the others, and in that way determining the number of policy holders in the quarter?

A. They are eliminated entirely from the policy holders who remain in the safety fund department and are in no way considered from that time on as members of that department.

Q. If in the manner you have described you are able to determine the number of persons who have lapsed out in each quarter, why are you not able by process of elimination to determine the amount produced or realized by each particular call?

A. There is no individual record kept of the money paid by the members except on the registers, as I have stated before, and from them and them only can the individual payments be determined. The cards used in the actuarial department do not show any amount as being paid from the individual members by way of assessment or otherwise.

Q. Will you please state the lapsed percentage adopted by you or your predecessors in office in paying all calls or assessments from November 17, 1885, the date of Dr. Davison's certificate?

A. I can give you these lapsed rates from June 1, 1901, only, as there are no records back of that date in the actuarial department of the company showing what lapsed rates were assumed on the various assessments previous to that date.

Q. Please state the lapse rate assumed on each call beginning with call 91, June 1, 1901.

A.—

The lapse rate on call 91, laid April 1, 1901, was 2½%.
The lapse rate on call 92, laid July 1, 1901, was 3.8%.
The lapse rate on call 93, laid October 1, 1901, was 6%.
The lapse rate on call 94, laid January 1, 1902, was 5%.
The lapse rate on call 95, laid April 1, 1902, was 5%.
The lapse rate on call 96, laid July 1, 1902, was 9%.
167 The lapse rate on call 97, laid October 1, 1902, was 10%.
The lapse rate on call 98, laid January 1, 1903, was 10%.
The lapse rate on call 99, laid April 1, 1903, was 6%.
The lapse rate on call 100, laid July 1, 1903, was 2%.
The lapse rate on call 101, laid Oct. 1, 1903, was 12½%.
The lapse rate on call 102, laid January 1, 1904, was 1%.
The lapse rate on call 103, laid April 1, 1904, was 5%.
The lapse rate on call 104, laid July 1, 1904, was 4½%.
The lapse rate on call 105, laid October 1, 1904, was 5%.
The lapse rate on call 106, laid January 1, 1905, was 3%.
The lapse rate on call 107, laid April 1, 1905, was 3½%.
The lapse rate on call 108, laid July 1, 1905, was 3½%.
The lapse rate on call 109, laid Oct. 1, 1905, was 3½%.
The lapse rate on call 110, laid January 1, 1906, was 2%.
The lapse rate on call 111, laid April 1, 1906, was 4%.
The lapse rate on call 112, laid July 1, 1906, was 3%.
The lapse rate on call 113, laid October 1, 1906, was 3%.
The lapse rate on call 114, laid January 1, 1907, was 2%.
The lapse rate on call 115, laid April 1, 1907, was 2%.
The lapse rate on call 116, laid July 1, 1907, was 2%.
The lapse rate on call 117, laid October 1, 1907, was 3%.
The lapse rate on call 118, laid January 1, 1908, was 3%.
The lapse rate on call 119, laid April 1, 1908, was 3½%.
The lapse rate on call 120, laid July 1, 1908, was 3%.
The lapse rate on call 121, laid Oct. 1, 1908, was 1.85%.
The lapse rate on call 122, laid January 1, 1909, was 2%.

Q. These assumptions or estimates of lapsed percentages were made at the time each assessment was laid?

A. They were.

Q. They represented the proportion of the business in force which in your judgment would not pay the assessment as to which the particular assessment was assumed?

A. They did.

168 Q. In other words, they were estimates of future lapses and not of past lapses?

A. They were.

Q. And what you as one of the officers of the company participating in laying that assessment were undertaking to do was to estimate the future lapses on that particular call?

A. We were; that is a duty which is put upon the officers of the company by the certificate contract.

Q. You did not always succeed in doing that with any degree of success or definiteness as to accuracy in gauging the number of future lapses on that call?

A. The lapse rate used on each call is assumed and is the best judgment of the officials of the company as to what lapse will occur on that call. There is no way by which we can absolutely determine what the lapse will be until the assessment has been paid.

Q. It was your aim and purpose in making each assessment to levy more than was required rather than less, was it not?

A. It was our purpose to assume a lapse rate that would be as near accurate as the conditions would permit us to forecast.

Q. It frequently occurred, did it not, that the actual experience of the company as to lapsation of members in its safety fund was that fewer certificate holders would lapse than was anticipated at the time the lapsed percentage was adopted as to that particular call, was it not?

A. The lapse is variable. It is often more than we assume and at times less than we assume.

Q. In such cases as when the lapses were fewer than anticipated on any particular call, naturally the result would be that more money would be collected on that particular call than would be actually required to pay the death claims for which that particular call was made?

A. On any call, where the lapse rate is less than that as-
169 sumed, the amount received on that assessment would be more than the amount for which we levied. If the lapse was more than that assumed on any particular call, the amount received would be less than the amount of death losses on that particular call.

Q. And as I understand your testimony, the amounts produced by all calls, in all cases, went into your mortuary fund?

A. They did.

Q. When did the company first adopt the practice, in making assessments, of assuming in advance a percentage of lapse?

A. I presume they have from the start. They always have since I have been connected with it.

Q. I call your attention to Exhibit 11, referred to in your direct examination, and ask you to state what it shows.

A. The first figures on the left of the exhibit are the dates and months, for each month from December 31, 1901, to December 31,

1902. The figures in the second column, under the head "Mortuary Balance," is the amount of money there was on hand in the mortuary fund on each of those dates in the men's division. The figures in column under the head "Outstanding Losses" is the amount of losses which had been incurred and which had not been paid in the men's division of the safety fund department on those dates, those particular dates.

Q. And Exhibit 12, attached to this deposition, gives the same information as to the period December 31, 1905, to May 31, 1907, both inclusive?

A. It does.

Q. I notice a column on Exhibit 12 and Exhibit 11 headed "Mortality Balance." Do you mean by that the balance in your mortuary fund as of those dates?

A. We do.

170 Q. And you undertook to raise that sum of $273,500 by assessment No. 113 at a time when the company already had in its mortuary fund on hand $202,303.14?

A. We must lay assessments for every loss incurred and give notice to the policy holders of that loss. The losses included in any assessment may have some of them been paid from the mortuary fund in advance. Our policy contracts give us ninety days in which to pay losses. It has been the rule of the company for many years to pay losses if by so doing it could better serve the beneficiaries under the certificates, at any time after the satisfactory proofs of loss were received by the company. Many of our policies are paid from one day's notice up and it is frequently the case that a portion of the losses included in any assessment have been paid before the assessment is laid, and this is entirely for the benefit of the beneficiaries.

Q. What was the custom of the company with respect to the custody of the balances in the mortuary fund as to place of deposit?

A. It is deposited in the regular bank depositories of the company, and is held there subject to daily checks.

Q. Does the company receive any interest on its daily balance?

A. It does.

Q. To what fund is that interest credited?

A. It is credited to the mortuary account of whichever division it belongs to.

Q. There was a period when the company was receiving no interest on its daily balance in the mortuary fund?

A. It is very rarely that banks will pay interest on any active deposit account, and it was not the custom in Hartford until within recent years. In 1903 an arrangement was made with our depository banks by which 2 or 2½ per cent interest was paid on daily
171 balances, and whatever has been received since that time on the balances in the mortuary fund has been credited or paid in to that account.

Q. In what banks at Hartford is your mortuary fund deposited?

A. Hartford National, First National and the State Bank.

Q. And it was not until 1903 that any interest was received by the company on its daily balances?

A. Not to my knowledge.

Q. It was the practice of the company to pay death claims out of this mortuary fund in advance of making the assessment to pay those particular death claims?

A. All funds received from assessments by the company are paid into its mortuary fund and every death loss must at some time be assessed for. The losses incurred are paid from the mortuary fund and are often paid before that particular loss is assessed for.

Q. In other words, you keep the mortuary fund as available for the payment of death claims at such times as in the judgment of the officers of the company it is expedient to pay those death claims?

A. Our certificates oblige us to carry a mortuary fund for the purpose of paying death losses, and where the beneficiary in any case is needy and desires that the loss shall be paid at once, upon the receipt of satisfactory proof the company has invariably paid losses in that manner from the mortuary fund.

Q. But the company determines with what degree of promptness it will pay out of the mortuary fund any particular death loss which has been approved by the company?

A. It must pay all death losses by its certificate contracts within ninety days from the receipt of satisfactory proof. Any earlier payments are at the discretion of the management of the company.

172 Q. And when, in the discretion of the management of the company, it is decided to pay a death loss prior to the expiration of ninety days, they do so?

A. They do, from the mortuary fund.

Q. Whether an assessment has been levied for that particular death or not?

A. They do.

Q. What have you included within the death losses designated on your Exhibits 11 and 12, as outstanding losses, and by that I mean do you include all deaths which have been reported to you or only such as have been reported, investigated and approved by the company?

A. The figures shown in that column headed "Outstanding Losses" are for all death losses of which the company has received notice. It is very rare that the company does not receive satisfactory proofs of losses of which it has been notified. I do not recall an instance in the last few years where we had not had satisfactory proofs after receiving notice of death loss.

Q. Do you include under the term "Outstanding Losses" all losses that have been reported to you, whether these losses have been subsequently paid or not?

A. They have invariably been paid.

Q. Have they invariably been paid without re istance?

A. I can not recall an instance where the company has included in any assessment or has entered in its books as an outstanding loss any claim where it has been subsequently necessary to resist the payment of the loss of which we had been so notified.

Q. Do you not enter on your books as an outstanding loss every case in which death has been reported to you?

A. No, sir.

Q. Then, if I understand your testimony, you have not included within the designation "Outstanding Losses" on your Exhibits
173 11 and 12 any claims except such as have actually been paid by the company?

A. That is correct.

Q. But it is also true, if I correctly understand your testimony, that you have included among the outstanding losses, so designated on your Exhibit No. 12, as of September 30, 1906, all death losses which had been reported to you up to that date where your records showed that the policy was in force?

A. We have.

Q. Upon what was your knowledge based that they would be paid by the company?

A. Because the company has for several years paid every claim reported to it in its safety fund department where the member's certificate was in force when such report came to the home office.

Q. Regardless of fraud in the application for insurance?

A. All policies in our safety fund department have been incontestable for several years, whether for fraud or misrepresentation in the application, by the expiration of the usual time for the company to plead such fraud.

Q. So that at the time calls 95 and 113 were made, the only defense that the company regarded as available to it as against any death claim, was because the policy had lapsed?

A. It was.

Q. It is true at all times since the dates of those calls?

A. It has been.

Q. If I correctly understand your testimony, then, you, in laying assessment against the certificate holders in your safety fund department, have not laid assessments solely for the purpose of meeting unpaid death losses, but have made assessments for the purpose of replenishing or maintaining the mortuary fund?

A. All assessments laid are solely for the payment of death losses, and each individual death loss is included in some
174 assessment. The receipts from all assessments are paid into the mortuary fund, from which the death losses are paid.

Cross-examination.

By Mr. Parks:

Q. General, I believe, if I understood your testimony correctly, that you were president of the defendant company in the year 1902?

A. I was.

Q. Who was secretary at that time?

A. Charles H. Bacall.

Q. I will submit to your Exhibit 37, purporting to be a list of the executive officers and directors of the defendant company during the several years therein mentioned, the same being furnished to us

upon request to your secretary, Mr. Lawrence. I will ask you to state, according to your best knowledge, whether that is a correct list?

A. It is.

Q. Now, in connection with the examination of this witness, let the record show that we offer this as Exhibit 37.

(List attached hereto and marked "Defendant's Exhibit 37".)

The defendant objects to the introduction of defendant's Exhibit 37, for the reason that the matter therein contained is immaterial and irrelevant to any issue in the case.

Objection overruled, and the defendant then and there duly excepted, and now excepts.

Exhibit No. 37, attached to the deposition, is introduced in evidence by plaintiff.

Said Exhibit No. 37 is as follows:

(This is a list of the names of the individuals who composed the directory and who held the offices of president, vice president, secretary and assistant secretary, year by year, from 1878 to and including 1909.)

175 The following is the list for 1902:

President, Geo. E. Keeney; Vice-President, E. C. Hilliard; Secretary, Chas. H. Bacall; Assistant Secretary, R. G. Keeney; Treasurer, R. B. Parker; Directors, Dwight Loomis, Lewis Sperry, Jas. H. Knight, E. C. Hilliard, Rockwell Keeney, Chas. H. Bacall, A. F. Eggleston, Geo. E. Keeney, R. B. Parker, R. G. Keeney, E. C. Linn.

George E. Keeney's deposition continued as follows:

Q. Exhibit 37 will then show who the president and secretary and directors of your company were in the year 1902?

A. It does.

Q. Who was the secretary of your company during the year 1902?

A. Charles H. Bacall.

Q. If I undersood you in your direct examination, Mr. Bacall, then the secretary, died in the year 1907?

A. He did.

Q. Now I submit to you exhibit of document relating to all payments made by Dr. J. T. Johnson, mentioned in the suit of Mrs. Johnson against the company, which I will have the notary mark "Exhibit 38", which has been prepared at my request by the courtesy of your secretary, Mr. Lawrence, and get you to state whether or not, according to the books and records of the company, that shows all the payments of mortality calls and dues, with credits of dividends in the respective columns paid under the policy sued upon by Mrs. Johnson against the Hartford Life Insurance Company.

A. It does.

Q. In connection with your testimony I now ask the notary to mark that "Exhibit 38."

(List attached hereto and marked "Exhibit 38".)

Exhibit No. 38, attached to the deposition, is introduced in evidence.

Said exhibit No. 38 is as follows:

176 EXHIBIT No. 38.

Chas. A. Safford, Notary Pub.

Lapsed for the non-payment of the Call due in June, 1902. (A.)
No. 109,854. Amount $5,000.00. Date 11-1-88. Age 51.
Life of—J. T. Johnson, M. D. Address, Schell City, Mo.
Canceled 8-5-02. Deposit Completed 6-5-90.

Year.	Mortality calls.	Dues.	Dividend.
1888.	. . . .	$3.75	
	$14.90	3.75	
1889.	16.17	3.75	
	16.29	3.75	
	17.10	3.75	
	17.10	3.75	
	17.70	3.75	
1890.	21.25	3.75	
	21.30	3.75	
1891.	20.05	3.75	
	20.05	3.75	
	19.59	3.75	
	20.59	3.75	
	20.59	3.75	
1892.	20.59	3.75	
	30.90	3.75	
	21.84	3.75	
	21.52	3.75	
1893.	21.52	3.75	
	21.52	3.75	
	23.30	3.75	
1894.	23.30	3.75	
	23.30	3.75	
	22.30	3.75	
	24.70	3.75	
	28.61	3.75	
1895.	26.33	3.75	$5.85
	26.32	3.75	

Year.	Mortality calls.	Dues.	Dividend.	
	28.36	3.75	5.25	
	28.36	3.75		
1896.	28.36	3.75	4.50	
	28.36	3.75		
	30.60	3.75	4.00	
	30.60	3.75		
1897.	30.60	3.75	3.40	
	30.60	3.75		
	34.17	3.75	4.40	
	41.00	3.75		
1898.	41.00	3.75	3.75	
	41.00	3.75		
177				
	43.78	3.75	3.75	
	43.76	3.75		
1899.	43.76	3.75	3.75	
	43.76	3.75		
	47.12	3.75	2.50	
	47.12	3.75		
1900.	51.05	3.75	2.50	
	51.05	3.75		
	54.72	3.75	2.50	
	54.72	3.75		($12.50)
1901.	60.65	3.75	3.75	(7.45)
	56.40	3.75		(8.08)
				(8.14)
1902.	70.80	3.75	2.85	(8.55)
				( )
Calls	$1,640.43	$202.50	$52.75	(5.28)
Dues	202.50			($50.00)
Dep.	50.00			(Dep.)
Add. fee (adm.)	20.00			
	$1,912.93			

	$1,912.93
Dividend	52.75
Total paid..	$1,860.18

George E. Keeney's deposition continued as follows:

Q. I will get you to state whether or not the assured or certificate holder, Dr. Johnson, paid the safety fund deposit in full to the de-

fendant company in accordance with his policy, and for the purpose of the answer I submit to you the receipt, which I will have identified as "Exhibit 39."

A. He did.

Exhibit No. 39, attached to the deposition, is introduced in evidence.

Said Exhibit No. 39 is as follows:

EXHIBIT No. 39.

Chas. A. Safford, Notary Pub.

The Hartford Life & Annuity Insurance Company.

Certificate of Deposit.

This is to certify that J. T. Johnson, M. D., of Clinton, Mo., has paid Fifty Dollars for Deposit to the Safety Fund under policy No. 109854 entitling him to all the advantages of the Safety Fund according to the conditions of said policy.

STEPHEN BALL, *Secretary.*

Hartford, Con., June 5, 1890.

Security Company of Hartford, Conn., Trustee of the Safety Fund.

178 George E. Keeney's deposition continued as follows:

Q. In your examination in chief counsel for the defendant has offered in evidence "Exhibit 6", which is special notice of quarterly call No. 95, dated May 2, 1902, and Exhibit 7, which is a duplicate of Exhibit 6 with stamped on it the words "Second Notice" and accompanied with a registered letter notice dated June 10, 1902, and also Exhibit 8, which is a list of claims included in quarterly call No. 95. I will ask you to state whether or not you ever sent any other notices of any subsequent calls—that is, commencing with No. 96—to Dr. J. T. Johnson.

A. No, sir; his policy was lapsed because of the nonpayment of call No. 95.

Q. If I understand you, the last notice that was sent to Dr. Johnson was what you call the registry receipt notice of June 10, 1902, with reference to call No. 95.

A. It was.

Q. If I understand you, the officers of the company then declared a forfeiture, and from that time on sent no notices to Dr. Johnson.

A. Dr. Johnson, by the failure to pay call 95, lapsed his certificate under the conditions of the certificate, and after the time limit, after the call 95 had expired, Dr. Johnson was marked "lapsed" on the books of the company, and from that time ceased to be a member of the safety fund department of the company.

Q. And from that time on, being the time mentioned in your previous answer, the defendant company, through its executive officers, treated his policy as lapsed. Is that correct.

A. We have not treated it at all, for he then ceased to be a member.

Q. And from that time on you never made any assessment or sent him any notice of any assessment for mortality calls, did you?

179 A. He not being a member of the safety fund department, we certainly would not do that.

Q. And certainly did not?

A. And certainly did not.

It is admitted that the following paper, designated Exhibit 40, is a copy of the letter written by Park & Son, attorneys for Nannie M. Johnson, March 12, 1907, Clinton, Mo., directed to the Hartford Life & Annuity Company at Hartford, Conn., and was received by the defendant in due course of mail, in about two days.

Exhibit No. 40, attached to the deposition, is introduced in evidence.

Said Exhibit No. 40 is as follows:

EXHIBIT NO. 40.

Chas. A. Safford, Notary Pub.

Clinton, Mo., Mar. 12, 1907

Hartford Life & Annuity Ins. Co., Hartford, Conn.

GENTLEMEN: Mrs. Nannie M. Johnson, widow of Jas. T. Johnson, has placed in our hands life insurance policy 109854 in the Hartford Life & Annuity Insurance Co., of Hartford, Conn., in the sum of $5,000 issued to Jas. T. Johnson, on his life for the benefit of his wife Nannie M. Johnson, if living, otherwise to his legal representatives. This policy is dated Nov. 1, 1888, through your agent M. L. Zener, at Clinton, Mo. Dr. Jas. T. Johnson, died on the 14th of Jan., 1907, I notice that your policy states that you will furnish proper papers for proof of loss, and this is a request to you to send us proper form to make proof of death and loss as required by the policy. On receipt of the same we will prepare and forward to you the necessary proofs of loss and hope that the Company will pay the same upon receipt of such proofs.

Respectfully, PARKS & SON.

George E. Keeney's deposition continued as follows:

It is admitted that the paper marked Exhibit 41 is a copy of the letter written by Mr. T. F. Lawrence, assistant secretary on behalf of the defendant company, to Messrs. Parks & Son, at Clinton, Mo., letter being dated March 18, 1907, and received by Parks & Son in due course of mail, in about two days.

Exhibit No. 41, attached to the deposition, is introduced in evidence.

180 Said Exhibit No. 41 is as follows:

EXHIBIT No. 41.

Chas. A. Safford, Notary Pub.

Hartford Insurance Company, Hartford, Conn.

T. F. Lawrence, Assistant Secretary.

D. C. March 18, 1907.

Messrs. Parks & Son, Attorneys at law, Clinton, Mo.

GENTLEMEN:

We are in receipt of your favor of the 12th inst., notifying us of the death of J. T. Johnson, insured under policy 109854.

We beg to inform you that this policy was canceled for the non-payment of assessment and dues in 1902, and there is, therefore, no claim under this policy.

Very truly yours,

T. F. LAWRENCE,
Assistant Sec'ry.

George E. Keeney's deposition continued as follows:

It is admitted that the paper marked Exhibit 42 is a copy of letter written by Peyton Parks, attorney for the plaintiff Nannie M. Johnson, to the Hartford Life & Annuity Company, on March 21, 1907, and that said letter was mailed by said Parks and received by said company in due course of mail, in about two days.

Exhibit No. 42, attached to the deposition, is introduced in evidence.

Said Exhibit No. 42 is as follows:

EXHIBIT No. 42.

Chas. A. Safford, Notary Pub.

Mch. 21, 1907.

Hartford Life Insurance Co., Hartford, Conn.

GENTLEMEN:

We have before us your letter of March 18th, answering ours of the 12th, concerning the death claim Johnson, under your policy 109854. You stated that the policy was canceled, but in this it seems to us you are mistaken, as we hold the policy here uncanceled. If you want us to send you proof of death and comply with the provision for proof of loss contained in the policy, we wish you would send us the papers. Do we understand to say that the company de-

clines to pay this? If so, we wish you would write more at length and state the matter fully so we can understand the same.

Thanking you in advance for an early reply, we are

Yours respectfully,

PEYTON A. PARKS.

181 George E. Keeney's deposition continued as follows:

It is admitted that the paper hereto attached, marked Exhibit 43, is a letter written by Mr. T. F. Lawrence, assistant secretary, on behalf of the Hartford Life Insurance Company, to Peyton F. Parks, attorney for Nannie M. Johnson. Said letter was dated and mailed on April 4, 1907, and was received by Peyton F. Parks in due course of mail, in about two days.

Exhibit No. 43, attached to the deposition, is introduced in evidence.

Said Exhibit No. 43 is as follows:

EXHIBIT No. 43.

Chas. A. Safford, Notary Pub.

Hartford Life Insurance Company, Hartford, Conn.

T. F. Lawrence, Assistant Secretary.

D. C. April 4, 1907.

Peyton A. Parks, Esq., c/o Parks & Son, Att'ys, Clinton, Mo.

DEAR SIR:

We are in receipt of your favor of the 21st ult. in further reference to policy 109854 on the life of J. T. Johnson, and note what you have to say in regard to this matter, but beg to advise you that as this policy lapsed for the non-payment of the assessment and dues called in June, 1902, it has been canceled in accordance with its terms, and the Company, therefore, cannot recognize any claim thereunder.

We note you state you hold the policy itself, but this does not in any way affect the fact that the policy is canceled as stated above.

Very truly yours,

T. F. LAWRENCE,
Assistant Secretary.

Dict. by M. M.

George E. Keeney's deposition continued as follows:

Q. Referring to Exhibit 8, which purports to be a list of death losses included in quarterly call No. 95, I will get you to state who made up that list.

A. It is made up in the general course of our business by the employes in charge of the death claim registers.

Q. Now, I wish you would take that list and tell what you and Mr. Bacall did after you received that list?

A. The executive officers of the company would not con-
182 sider that list in any way in making up the assessments. We would take the total amounts of the losses, without individualizing them in any way, and make up our assessments. The iist, Exhibit 8, showing the death losses in call 95, is made up for the benefit of the certificate holders, and a copy of that list is sent to each individual with his call.

Q. Then, if I understood you in your examination in chief and your answer thus given, having the sum total of the losses in this call, you proceed then to make an assessment?

A. We do.

Q. And in pursuance of that authority and custom of your department you made what you thought was a due allowance?

A. We did.

Q. And in this particular cali you and Mr. Bacall estimated that it would be five per cent?

A. Yes, sir.

Q. I notice in your answers you use the words "executive officers." And in order that I may understand it, I would be glad to have you explain with reference to this call No. 95 and the assessment on which it was based, who were the particular executive officers of the company that levied that assessment and caused the calls to be sent out?

A. It is impossible to designate whether it was the president and secretary, or whether it was the vice president and secretary, or possibly the vice president and assistant secretary—we had one at that time, because the charter of the company, or the by-laws, I am not sure which, provide that in case the president is absent the vice president performs his duties, and the same applies to the assistant secretary in case the secretary is absent. It is impossible for me to tell you whether the president or secretary were personally absent at the time that particular assessment was made, for there is
183 no record made on the books of the company showing which particular officer authorized that assessment.

Plaintiff moves the court to strike out that part of the foregoing answer which reads as follows:

"Because the charter of the company, or the by-laws, I am not sure which, provide that in case the president is absent the vice-president performs his duties, and the same applies to the assistant secretary in case the secretary is absent."

Which motion was sustained by the Court.

Defendant then and there at the time excepted.

George E. Keeney's deposition continued as follows:

Q. If I understand your answer, and I think I do, General, that work was either done by the president or vice-president acting in his absence, with the secretary or some person filling that office in the absence of the secretary?

A. It was.

Q. You state that you had death losses, if I understand you, in

the course of payments extending through the entire term of each year; that is, you did not pay all death losses at a stated time or period, but you paid them as the proofs came in, as it suited your convenience?

A. It would be impossible for us to pay death losses at a stated date, for the reason that our certificates require us to pay all losses within ninety days from the acceptance of satisfactory proof. It is the custom of the company to pay death losses almost daily.

Q. So that the books of the company would show on any date death losses which had been approved as outstanding death losses and yet not paid?

A. They would.

184 Q. I will get you to state whether the books of your company would not show in the same way assessments due from certificate holders in the Safety Fund Department in process of collection?

A. The registers would; no other books of the company would, and the registers would only show the amount which had been paid by each individual.

Q. Then, if I understand you, taking the registers referred to by you, your clerical force could make up the amount of unpaid mortality calls in process of collection due the Safety Fund Department on any given date?

A. It could be done, but we have never done that in connection with any call, as it would necessitate the examination on the registers of every individual policyholder in that department.

Q. May I inquire whether you have no books wherein you keep the aggregate amount of unpaid assessments or mortality calls in course of collection in the Safety Fund Department, either by the day, month or year?

A. We have not.

Q. Have you such books as would show the aggregate amount due or unpaid from any and all calls of unpaid mortality calls in the process of collection in the Safety Fund Department?

A. We have not.

Q. I will get you to state in connection with Exhibits 11 and 12, offered in your examination in chief, if on the 31st day of December, 1901, 1902, 1905 and 1906 there were not outstanding unpaid premiums or assessments under mortality calls due the Safety Fund Department sums of money due the company on such accounts?

A. There was not a dollar due on any of those dates.

Q. Were there on the 30th day of November of the same year?

A. There was.

185 Q. Are you able to state the amounts?

A. I am not, as that can only be determined by taking from the registers, compiling from the registers, each individual account, and adding them together.

Q. Now, I will ask you with reference to date October 31, 1902, touching the same exhibits, whether or not there were items of unpaid mortality calls in process of collection?

A. There was.

Q. Can you state the amounts?

A. I can not, as that can only be determined by compiling from the registers each individual account and adding them together.

Q. General, were all the claims that are mentioned in the list of death losses found in Exhibit 8 on each mortality call No. 95, paid by the company?

A. They were.

Q. If I understand your prior testimony, some of those claims may have been paid in advance, and probably were, and some of them were probably paid subsequently?

A. Some of them were paid in advance, there is no question about it at all.

Q. Was there any litigation over any of them that you recall?

A. No.

Q. Did you ever take occasion to note what percentage actually did lapse under mortality call No. 95?

A. We know the amount of insurance that has lapsed on every individual call.

Q. What was the actual lapsed per cent on call 95?

A. On call 95 the percentage of lapse was 3 52/100.

It is stipulated in the case of Nannie M. Johnson versus the Hartford Life Insurance Company, subject to all objections which may be urged by the defendant as to the competency and relevancy of the facts now admitted, that if Dr. J. T. Johnson had con-
186 tinued his payments of the mortuary calls as they fell due up to the time of his death, the amount of the call due March 1, 1907, would have been as follows:

	Mortuary	Dues.
Call due March, 1907	$71 50	$3 75 to June, 1907.
Proportion of call of June, 1907	17 45	7 50 to Dec., 1907.
	$88 95	$11 25

which two last totals added together makes an aggregate of $100.20, less dividend credit as of date March, 1907, $3, net $97.20.

Q. And on call 95 the anticipated lapse or assumed lapse was five per cent?

A. It was.

Cross-examination.

By Mr. Rosenberger:

Q. What became of that excess?

A. All moneys received for mortuary purposes are paid into the Mortuary Fund of the company, from which the death losses are paid, and every dollar paid on that and all other calls which have ever been laid by the company have been paid directly to the Mortuary Fund.

Q. Any excess payments made in this way by the certificate holders were not paid into the accounts of the certificate holders, but went into the Mortuary Fund; is that true?

A. We use our best judgment as to what per cent that lapse will be. It would be a business impossibility without doubling the expense in collecting these assessments to refund to each individual policyholder his proportion of the excess collection, if any. Indirectly, it is credited to him and all other certificate holders in the Safety Fund Department in its entirety when it is paid into the Mortuary Fund, as the Mortuary Fund can not be used for
187 any purpose excepting the settlement of death losses, all of which must be paid by the certificate members.

Q. Your idea was so long as the money went into the Mortuary Fund the certificate holder got all that was coming to him?

A. Every dollar.

Q And entitled to participate in that Mortuary Fund were certificate holders holding some thirty-five different forms of contract?

A. Every certificate holder in the Safety Fund Department, irrespective of what form of policy he holds, does participate in the Mortuary Fund.

Q. The balances on hand in the Mortuary Fund vary from day to day, do they not?

A. They do.

Q. But so long as you have been connected with the company there has always been a balance on hand in that fund?

A. There has.

Q. Was the Mortuary Fund at all times used solely for the payment of death claims?

A. And it never has been used for any other purpose.

Q. Do you not pay the expense of investigating and adjusting death claims out of the Mortuary Fund, and have you not done so prior to the laying of call No. 95?

A. Any expense connected with the settlement of death claims has been paid from the Mortuary Fund.

Redirect examination.

By Mr. Jones:

Q. When was it that you said the Hartford Life Insurance Company ceased to write new business in the Safety Fund Department?

A. February, 1899.

Q. Won't you tell us briefly why it was that they ceased to write new business in the Safety Fund Department?

A. For several years previous to that time public sentiment was decidedly against assessment life insurance, and the company had constantly lapsed more business than it had written for four
188 or five years. Several states had passed laws absolutely prohibiting the right to do assessment insurance within those states. After giving the matter very careful consideration, the management of the company decided that they would discontinue writ-

ing assessment business and write legal reserve business entirely, and from that time to the present time we have done that.

Q. Will you state whether you know it to be a fact that a great many assessment insurance companies and associations either failed or suspended or quit doing business about and since the date that you have indicated?

A. That is true. I do not know but one company that has carried on assessment insurance in the last few years with any degree of success, and that is a western company where that form of insurance would be perhaps more acceptable than it would in the East, where the old line companies, so many of them, are located.

Q. I wish you would state whether it was your judgment and the judgment of your directors that it was practically impossible to write assessment insurance after 1899 in this section of the country?

A. At the time the change was made I was not connected with the company, but I was more or less familiar with its business. I know that to be the fact.

Q. In any event, when you became the president of the company it had been decided not to write new business in the Safety Fund Department and had already embarked in the old line, level-premium business when you became president?

A. Yes.

Q. And you have stated to be the fact, either by virtue of the laws or by the rulings of the departments in the several states, that both classes of business can not be written by any company at the
189 same time?

A. They can not.

Q. General Keeney, as a general proposition, except where they are expressly stated to include both divisions, the figures given by you in your testimony and in the several exhibits which have been introduced, relate exclusively to the men's division?

A. They do.

Q. And that is particularly true as relates to the figures concerning the Mortuary Fund and the Safety Fund; except where they are otherwise stated to include both funds they relate exclusively to the funds in the men's division of the Safety Fund Department?

A. They do.

Q. You stated in answer to Mr. Rosenberger's question that previous to 1880 the company wrote exclusively legal reserve or level premium business, and that from 1880 to 1899 it wrote Safety Fund business entirely. I want to ask you whether that answer, as my notes show it to have been made, is strictly correct. And if it should not be explained or added to by the further statement that in addition to the Safety Fund business written during 1880 to 1899 you also during a part of that period wrote the stipulated premium seven-year term contract business which did not become Safety Fund policies until after seven years from the date of issue?

A. That is true. My answer intended to include in the term Safety Fund business the seven-year policies to which you refer because those policies provide a contribution to the Safety Fund, but were

not included in the Safety Fund policies for the purposes of assessment until after seven years from the date of issue.

Q. When was it that the company began to write industrial business?

A. I think it was about 1900.

190 Q. You ceased to write that business in what year?

A. 1904.

Q. What do you mean by industrial business?

A. Industrial insurance is that class where the premiums are paid weekly and is for very small policies.

Q. Approximating what amount of insurance on each policy?

A. From $150 to $200 was the average of the policies.

Q. How much of that business did you have in force, approximately, about 1904?

A. About $6,000,000, six or seven millions.

Q. What became of that business?

A. We turned that business over to the Metropolitan Life Insurance Company of New York.

Q. And that in a measure accounts for the apparent decrease in your legal reserve business at about that time?

A. It does.

It is hereby stipulated between counsel, in order to make the following parts of this deposition intelligible, that Exhibits 2 and 5, referred to in the questions, are respectively the original and copy of the policy issued to one Davison, and it is further stipulated that the said exhibits are in form the same as the policy which was issued to Dr. Johnson in this case.

George E. Keeney's deposition continued as follows:

Q. I notice that in both policies sued on, being Exhibits 2 and 5, a provision concerning the assessment indicates the purpose for laying the assessment as follows: "To form a Mortuary Fund for the payment of all indemnity matured by deaths," and I also understand your practice is, and for many years has been, to levy assessments quarterly. I wish you would explain in some detail why it is necessary to have a Mortuary Fund on hand, and why the levying
191 of quarterly assessments after the death of a member and the waiting for collection of those assessments would be impossible and impractical, in view of the provision in the contract which requires you to make payments ninety days after satisfactory proofs have been submitted?

A. All certificates issued in the Safety Fund Department provide for the payment of death losses in the following manner: "Out of the aforesaid Mortuary Fund and not otherwise." It is absolutely necessary, if the company is to continue its existence, that we have a Mortuary Fund sufficiently large so that we can pay our losses within the time stipulated within our contracts, which is ninety days from the date of the receipt of proofs of death. This necessitates the laying of an assessment at least once each quarter, or many losses would mature before sufficient funds were received by the

company to care for those losses. For instance, a loss may occur on January 2d. The previous assessment has been laid as of January 1st. The proof of death may be received by this company on January 3d, or within a few days of that date. The payment on that certificate would be due on the same date in the month of April that proofs were received in the month of January. It would be assessed for on April 1st, and the notices of that assessment would go out on April 30th. The payments for that assessment would be due on July 1st, with four days' grace added, making the final date of payment July 5th. Many of the losses included in that assessment would be due and must be paid during the month of April. If the company did not have a Mortuary Fund in existence from which to pay those losses it would default in its payments and consequently would be declared insolvent.

192 Q. You have called attention to the fact that the contract of the company is to pay the amount of the insurance "out of the Mortuary Fund and not otherwise," and I ask you whether one of the purposes in maintaining the Mortuary Fund is not for the purpose of having a Mortuary Fund on hand from which you could pay the amount of the insurance thus conditioned?

A. It is.

Q. You have been interrogated by Mr. Rosenberger concerning different forms of Safety Fund policies, and it has been indicated that from time to time there have been changes in the verbiage of the contract. I now ask you if it is not the fact that all of those Safety Fund contracts, and, of course, when I use the term Safety Fund contract I am referring constantly to the Safety Fund contract in the men's division unless I otherwise indicate—did not belong to one of the three following classes, to-wit, what you have described as Form 3, Form 4 and the regular Safety Fund contracts?

A. They did.

Q. The regular Safety Fund contract is that general class of contract shown by Exhibits 2 and 5 which vary in phraseology, but both of which provide for the levying of assessments or mortuary calls at the same rate per assessment?

A. That is true.

Q. Now, what you have described as Form 3 was likewise issued with varying phraseology, but those contracts, whatever was the particular form on which they were written, likewise provide for assessments at rates different from those which were applicable to the regular Safety Fund contract?

A. They do.

Q. And Form 4, which was likewise issued on blanks, the phraseology of which changed from time to time, but always provided that they were term contracts for the first seven years and that
193 they should become Safety Fund contracts and participate in the general mortality of the regular Safety Fund members at the end of seven years?

A. They did.

Q. Now, please state whether all of the assessments levied against Dr. Johnson, and particularly assessment 95 levied against Dr. John-

son, were not also levied against all the members then in the Safety Fund department, men's division?

A. They were.

Q. And none of the members of the women's division were assessed at the same time or with the members of the men's division, were they?

A. They were not.

Q. And none of the men's division were assessed at the same time or with the women's division?

A. No. There never has been an assessment laid in which the members of the women's division have been connected in any way with the assessment of the men's division, nor has there ever been an assessment laid in which the members of the men's division have been connected in any way with the women's division.

Q. General Keeney, if by reason of the assumption of the company of a percentage of lapse on a given assessment greater than actually occurred, or if by reason of the assumption of a ratio a fraction larger than is shown by the detailed calculation of the assessment, there was paid in on any assessment or call a greater amount of money than was absolutely necessary to provide for the deaths upon which that assessment was based, what became of that excess?

A. It went into the Mortuary Fund of the company in every instance.

Q. And, having gone into the Mortuary Fund of the Company, for what purpose was it used in all cases?

194 A. In every instance for the settlement of death claims.

Q. Which included the payment of death losses and the cost of investigation of death claims and defense of the Mortuary Fund from assailants on the Mortuary Fund by claimants that were not entitled to participate?

A. That is true.

Q. Did the company, as such, or did the stock department of the company profit in any wise from such excess collection, if any?

A. Not in the slightest degree.

Q. You understand, General, that where I do not by my question expressly indicate that I am including the women's division as well as the men's department in my question, your answer should refer exclusively to the men's department?

A. I do.

Q. And such excess, if any was collected, has either been paid out for the payment or settlement of death claims as you have indicated, or is still in the Mortuary Fund for the benefit of the members of the Safety Fund department, men's division?

A. That is true.

Q. You have stated in answer to Mr. Rosenberger that it was impossible or impractical, without a great deal of labor and the consummation of a large amount of time, to indicate how much would be outstanding at any particular time on account of assessments unpaid and in the course of collection. I wish you would please state why that is impracticable.

A. It is impossible for the company to determine what part or portion of an assessment will be paid. It is entirely optional with a member whether he pays the assessment or not, and we have no means of knowing whether it will be paid or not until his payments are received in the home office. There is no account out-
195 side of the registers carried with any individual member, and
there is no book or set of books from which by merely adding up the totals the aggregate amount of assessment which had been paid at a particular date could be determined; in order to ascertain the amount of a given assessment outstanding and in course of collection you would have to make a list from the policy register books of each policy and the amount of each assessment and go through other books to determine whether or not on a particular day any particular assessment had been paid. This would involve the examination of about 15,000 separate and distinct entries on the policy registers and other books.

Q. Please state whether each and all of the assessments laid by the company on its Safety Fund membership, men's division, were based upon the death losses that had actually occurred and the calculation made in the general manner in which you have indicated by your Exhibits 9 and 18, allowing for lapsation and dividing the amount that would be realized by an assessment by one rate into the aggregate amount of the death losses, which constituted the basis of the assessment for the purpose of determining the number of rates which it would be necessary for you to collect.

A. That is true.

Q. It appears from the testimony and the exhibits already introduced in evidence that the losses assessed for on call 95, which is the call on which Dr. Johnson lapsed, was $362,500. I wish you would state what was actually received into the Mortuary Fund of the men's division of the Safety Fund department during the months of May, June and July, 1902, month by month, and give us the total.

A. Payments received in May, 1902, $139,602.39; payments received in June, 1902, $202,356.89; payments received in
196 July, 1902, $14,329.70, making a total for the three months
of $356,288.98.

Q. Now, will you please state what the death losses were for the months of April, May and June, 1902?

A. In the month of April, $124,000; in the month of May, $89,000; in the month of June, $133,500.

Cross-examination.

By Mr. Rosenberger:

Q. You have stated that the reason that the company ceased to write Safety Fund certificates in the Safety Fund department in 1899 was by reason of an adverse public sentiment toward assessment insurance, and also on account of some hostile legislation in some of the states. I will ask you to state whether by reasons of the conversation of the investments by Security Company as trustee from government bonds to other forms of securities, it required a less

amount of cash to bring the Safety Fund to its maturity of one million dollars, par value?

A. It did. The Security Company has estimated that it required $170,000 less to complete the Safety Fund with the securities which they actually held when that fund was completed in 1894, than it would have required by investing in government bonds exclusively, to complete the fund if it had been invested exclusively in government bonds.

Q. What became of that $170,000 of saving?

A. It was returned to the certificate holders in dividends.

Q. In the purchase of government bonds it is necessary to pay a very high premium on government bonds in their acquisition, is it not?

A. It is.

Q. A much higher premium than it is necessary to pay upon other forms of securities?

A. Very much higher.

197 Q. Therefore, with a given amount of cash you can buy fewer government bonds than you can buy other forms of securities?

A. It is true.

Q. And it is a fact that by reason of changing the form of investments from the government bonds to other forms of securities the maturity of the Safety Fund to its $1,000,000 par value was accelerated?

A. Very much.

Q. Now, if I recall your cross-examination, the payments made by the Security Company to the defendant company for dividend purposes, under the practice of the company, were made to inure to the benefit not only of those who had contributed to the Safety Fund up to the point that it reached $1,000,000, but also in favor of those members who had contributed to the Safety Fund after it reached its maturity of $1,000,000, par value?

A. The certificate contracts provide that all members shall participate in the accretions and dividends and earnings from the Safety Fund five years after they have completed their payments of $10 per thousand to that fund.

Q. And that was carried out?

A. Absolutely, in every instance.

Q. Now, is it not true that the company, in soliciting its Safety Fund business, represented both by circulars and through its soliciting agents, under direct instructions from executive officers of the company, that all contributions to the Safety Fund made by new members after that fund had reached its maturity of $1,000,000 par value, would inure exclusively to the benefit of those who had contributed to that fund of $1,000,000?

A. Absolutely no.

Q. And is it not true that the new business in the Safety Fund department of the company became greatly reduced in volume
198 after the illusory character of those representations and promises had been ascertained?

Mr. Jones: I object to the form of the question, because it calls for a conclusion, attempts to characterize certain representations made by others, as well as because the matter inquired about is irrelevant and immaterial.

A. No such representations were ever made. It is absolutely contrary to the contract issued to every member.

Q. The increase or revision of rates made by the company in its Safety Fund department in 1894 also was a material factor in causing the falling off of business in that department, was it not?

A. Not the slightest.

Q. Was there not also a great deal of complaint among the membership in the Safety Fund department indicating disappointment on their part in the dividends derived by them from the Safety Fund?

A. Not to my knowledge.

Redirect examination.

By Mr. Jones:

Q. Referring now to the unpopularity of assessment business bout the year 1899, what was the effect of that unpopularity with egard to your getting or holding agents to solicit applicants for embership in the Safety Fund department?

A. It was very difficult to dispose of the form of insurance which e were writing, and for that reason it was almost impossible to get gents to work for the company.

Q. And without the proper agency it was impossible to keep getng new business?

A. It was.

99 Q. Mr. Rosenberger has spoken here of the revision of rates when the form 3 policies were issued. In such revision e rate was in no sense a revision of rates upon the existing policylders, but was merely a new table of rates which applied exsively to new members coming into the Safety Fund department?

A. It had no effect whatever on those who were already members the Safety Fund department.

Q. Now, you have spoken of the very high premium at which it s possible to get government bonds for investing moneys of the fety Fund, and have stated that the premium upon government nds was very much higher than the premium upon the bonds and ner securities in which the Safety Fund was actually invested. u have also stated that as time went on and the period of maturity either of these classes of bonds approached the premium of the nds constantly decreased. I want to ask you to state whether or t, if the fund had from its inception been invested in government nds at this higher premium, the effect upon the Safety Fund uld not have been to materially reduce its earning power, and the idends which would have been applied to the certificate holders in Safety Fund department below what was actually applied to them way of dividend from the investment as actually made?

A. The amount that would have been available to apply for dividends under those conditions would have been very much less than what has been applied."

The defendant thereupon introduced the deposition of Frank D. Munger, which reads as follows:

FRANK D. MUNGER, sworn.

Examined by Mr. Jones:

Q. State your full name.
A. Frank D. Munger.
200 Q. Residing where?
A. 436 Washington street.
Q. What is your age?
A. 42.
Q. What is your business?
A. Superintendent of the Registry Division of the Hartford postoffice.
Q. How long have you been connected with the Registry Division of the Hartford postoffice?
A. Seventeen years ago the 16th day of last November.
Q. In 1902, on the 11th day of June, did you receive as official of the Postoffice Department and of the Registry Division thereof a letter directed to J. T. Johnson, M. D., of Schell City, Missouri?
A. I did, by the records.
Q. Did you make a record of that letter when you received it?
A. Yes.
Q. Is the paper which you now have before you a copy of that record?
A. That is the original record.
Q. And by whom was the writing on that record made?
A. By myself.
Q. At the time that you received the letter?
A. Yes, sir.
Q. Will you state whether the paper which I now hand you is a copy of that record in so far as it relates to the entry of the receipt of a registered letter directed to Dr. J. T. Johnson, M. D., Schell City, Missouri?
A. Yes, sir; it is a copy of the original.
Q. From whom was that letter received by you?
A. From the Hartford Life Insurance Company; the individual I can not tell.

(Copy of record just identified by witness is marked Exhibit No. 13.)

By Mr. Jones: Exhibit No. 13, attached to the deposition, is introduced in evidence.

Said Exhibit No. 13 is as follows:

201 DEFENDANT'S EXHIBIT NO. 13.

Charles A. Safford, Notary Public.

(Duplicate.)

Bill No. —. Page of Bill —. Post Office at Hartford, Conn.

Received, June 11, 1902, from Hartford Life Insurance Company, the following described pieces of registered mail {letters / parcels} numbered from 511 to 540, inclusive, making a total of thirty pieces.
(Write number here in words.)

Line number.	Name of addressee.	Post office address.	Registry number.	R. P. E. number.	Date when registry bill returned.	Remarks.
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
0.						
1.	J. T. Johnson, M. D.	Schell City, Mo.	521			
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
0.						
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
0.						

Bill No. —. Page of Bill —. Total of — Registered Pieces on Bill.

Received from —— ——, the above described Registered Pieces, numbered from — to —, inclusive.

(Date of Receipt.)

(After receipt has been signed, this Coupon should be pasted over its counterpart in the book from which taken.)

Munger, for Postmaster, at ——.

(Receiving Clerk will sign his full name.)

5-1260

202 Frank D. Munger's deposition continued as follows:

Q. That original record, of which No. 13 is a copy, was made by you at the time you received the letter?

A. Yes, sir.

Q. And the letter bore registry number what?

A. 521.

Q. Now, what was done with the letter after you received it, further than to write that receipt?

A. It was enclosed in another envelope and sent to the postmaster at Schell City, Missouri.

Q. Now, in the regular course of business, where a registered letter is sent out from your department to another town to the postmaster of that town, as you have described this one was sent, would there come back to you in the regular course of business a receipt from the postmaster to which the letter was sent?

A. Yes, up to 1907, December 1st.

Q. Now, those receipts that come back from the postmaster show that he has received the letter, do they not?

A. Yes.

Q. How long are they preserved by your department here?

A. Five years.

Q. And after five years what becomes of them?

A. Destroyed.

Q. And the receipts which came back from the postmasters during the year 1902 to your department, have they been destroyed?

A. They have.

Q. So that you now have no receipt from the Postmaster of Schell City of this letter?

A. No, sir.

Q. And this record, a copy of which has been marked Exhibit 13, is the only record in your department now of the sending of that letter?

A. Yes, sir.

The defendant thereupon introduced the deposition of Arthur M. Bunce, which reads as follows:

203 ARTHUR M. BUNCE, being duly sworn, examined by Mr. Jones, testified as follows:

Q. State your full name?
A. Arthur M. Bunce.
Q. What is your residence?
A. Hartford.
Q. What is your age?
A. 37.
Q. What is your business?
A. I am bookkeeper in the employ of the Security Company.
Q. At what point?
A. Hartford, Connecticut.
Q. The Security Company is the trustee in a contract concerning the Safety Fund with the Hartford Life Insurance Company?
A. It is.
Q. And there are two of those funds, one known as the men's fund and the other as the women's fund?
A. They are.
Q. Have you prepared a statement from the books of the Security Company as to the condition of the Safety Fund, at the several dates indicated on the paper which I now hand you?
A. I have.
Q. Is that a correct statement of the condition of the fund on those several dates, Mr. Bunce?
A. To the best of my knowledge and belief.
Q. And made from the books of the company?
A. It is.
Q. In the first column appears the subdivision of the fund in the men's safety fund and in the women's safety fund, the men's income account and the women's income account. Now, the account in so far as it relates to the income was kept separately from the account in so far as it relates to the principal on the books of the company, was it not?
A. It was on those dates.
A. It was on those dates.
204 Q. Now, in the second column, you have set forth the book value of the securities or funds, and in the third column the par value?
A. I have.
Q. Do the figures that appear under the heading, "Book Value," appear on the books of the several dates you have given there?
A. They do.
Q. And the figures which appear under the heading "Par Value" appear on the books of the company on the several dates you have given there?
A. They do.
Q. Will you please state the date at which the men's division of the Safety Fund reached the sum of one million dollars, par value?
A. Presumably, approximately, as near as can be determined, on the 31st of December, 1893.

Q. And the term "par value" is the par or face value of the securities in which the fund is invested?

A. Par value is the face value of the securities where they did not represent a cost of more than that face value. In such cases as they represent a cost of less than the par or face value it represents the cost values; that is to say, there were no securities carried above their cost.

Q. Now, you have stated that the men's division of the Safety Fund reached one million dollars par December 31, 1893. Please state whether or not, since that date, all deposits for amounts received from members as contributions for the Safety Fund have been credited to the income account and divided, with the increment from the fund.

A. They have been credited to the income account and turned over for division, together with other income.

Q. Now, how often did the Security Company make distribution of the earnings or increment of that fund to the Hartford Life Insurance Company?

205 A. Twice a year.

Q. And approximately at what dates?

A. Those balances were reported as of June 30th and December 31st of each year, and the Hartford Life Insurance Company has drawn those accounts at their pleasure thereafter.

Q. Now, the tabulation which you have prepared from the books is shown on the paper which you have had before you and which will now be marked Exhibit No. 20. As a matter of fact, in the actual practice, were they or not drawn down by the Hartford Life Insurance Company very soon thereafter?

A. Within a short time, yes.

(Paper referred to hereto attached and marked Exhibit 20.)

By Mr. Jones: Exhibit No. 20, attached to the deposition, is introduced in evidence.

Said Exhibit No. 20 is as follows:

DEFENDANT'S EXHIBIT NO. 20.

Charles A. Safford, Notary Public.

	December 31, 1900.	
	Book value.	Par value.
Men's Safety Fund	$1,041,285.29	$1,000,000.00
Women's Safety Fund	120,234.13	116,670.47
Men's Income Account	30,820.96	
Women's Income Account	2,188.76	

December 31, 1901.	Book value.	Par value.
Men's Safety Fund	$1,053,394.04	$1,000,000.00
Women's Safety Fund	124,765.16	119,035.72
Men's Income Account	23,055.11	
Women's Income Account Overdrawn	140.81	

April 30, 1902.	Book value.	Par value.
Men's Safety Fund	$1,056,354.04	$1,000,000.00
Women's Safety Fund	124,776.41	118,879.72
Men's Income Account	13,751.14	
Women's Income Account	128.83	

June 1, 1902.	Book value.	Par value.
Men's Safety Fund	$1,056,654.04	$1,000,000.00
Women's Safety Fund	124,776.41	118,879.72
Men's Income Account	17,003.86	
Women's Income Account	503.83	

206

December 31, 1902.	Book value.	Par value.
Men's Safety Fund	$1,056,940.29	$1,000,000.00
Women's Safety Fund	126,562.86	120,401.64
Men's Income Account	25,096.92	
Women's Income Account	2,292.66	

September 30, 1908.	Book value.	Par value.
Men's Safety Fund	$1,053,690.13	$1,000,000.00
Women's Safety Fund	127,775.89	121,516.64
Men's Income Account	11,540.87	
Women's Income Account	2,175.24	

December 1, 1908.	Book value.	Par value.
Men's Safety Fund	$1,050,694.13	$1,000,000.00
Women's Safety Fund	127,775.89	121,516.61
Men's Income Account	18,994.73	
Women's Income Account	2,717.00	

December 31, 1908.	Book value.	Par value.
Men's Safety Fund	$1,050,662.88	$1,000,000.00
Women's Safety Fund	127,775.89	121,516.61
Men's Income Account	19,981.46	
Women's Income Account	2,533.83	

The Men's Division of Safety Fund reached $1,000,000.00 December 31, 1893.

Since that time all deposits or assessments have been credited to income account and divided with other income.

Arthur M. Bunce's deposition continued as follows:

Q. What officer of your company has charge of the investment and reinvestment of the securities in the Safety Fund?

A. The president, with the consultation of the committee of the Hartford Life Insurance Company.

Q. The Executive Committee or the Board of Directors of the Hartford Life Insurance Company, or what committee?

A. The president, after consultation with the committee of the Hartford Life Insurance Company, makes the investments and they are approved by our Board of Trustees; we have a Board of Trustees.

Q. What is the name of your president?

A. Atwood Collins.

Q. Have you, as bookkeeper of the Security Company, special charge of the trust fund known as the Safety Fund of the
207 Hartford Life Insurance Company, or do your duties include general bookkeeping work?

A. They include general bookkeeping for the Company.

Q. Who has the custody—what officer of your company has the custody of the securities in the Safety Fund, so called?

A. The treasurer, with the Hartford Life Insurance Company.

Q. You have no personal knowledge of the character of the securities in the Safety Fund, nor their value, other than is shown by the books of your company, have you?

A. No, sir.

Q. What officer of your company, the Security Company, fixes the commissions and other compensation charged by the Security Company for handling the Safety Fund?

A. It was before my time; I have only been there ten years.

Q. The fact of the matter is, you are a bookkeeper at the Security Company, having charge of the general books of account at that company, and at the request of counsel for the defense in these cases you have furnished the information requested by counsel and no other. You have made no investigation as to the condition of that fund, nor of the value of the securities in that fund, except as you have testified in your direct examination, and this only at the request of counsel for the defendant?

A. I have given the records as shown by the books on various dates.

Q. But you have made no examination except as to the subjects about which you were interrogated on your direct examination?

A. No, sir.

Q. Who is the treasurer of your company?

A. Charles Edward Prior.

208 Q. How long have you been a bookkeeper with the Security Company?

A. Approximately ten years.

Q. During all of that time have the investments on account of the Safety Fund involved in this litigation been made in the manner you have described, namely, by the president of your company, with the consent of a committee of the defendant, the Hartford Life Insurance Company, and afterwards approved by the directors of the Security Company?

A. Personally, I never have been associated with any investments. To the best of my knowledge and belief, they have.

Q. You do not know, then, do you, as to how the investments and reinvestments of this fund are made?

A. Not from actual association with the investments.

Q. What is your knowledge based on, if you know?

A. (No answer.)

Q. You not having participated in the investment or reinvestment of this fund, what knowledge have you of the custom?

A. I believe that to be the usual method.

Q. Is your belief based on what you have heard about the fund in the office of the Security Company?

A. Yes.

Q. It is based, then, on what you have heard and not on what you have actually seen or participated in?

A. Yes.

Q. You have stated that on December 31, 1893, the par value of the securities in the Safety Fund reached the sum of $1,000,000. Is that correct?

A. It is.

Q. You have also stated that after that date, December 31, 1893, all contributions to the Safety Fund in the way of deposits of members in the Safety Fund were added to other income from that
209 fund, and from time to time distributed by being paid over to the Insurance Company.

A. They have been paid over by us to the Insurance Company, I presume for distribution. I have no reason to believe they were not, although we never made the distributions.

Q. Your company does not distribute either the income or the Safety Fund deposits or anything else arising from the Safety Fund to members, but turns the money over to the Insurance Company for distribution?

A. Yes.

Q. Will you please tell me how much money was paid in to the Security Company by the Insurance Company in the way of Safety Fund deposits subsequent to December 31, 1893?

A. I can not answer that without making an exhaustive examination.

Q. You have stated that all moneys received by your company subsequent to December 31, 1893, on account of the Safety Fund deposits was returned or paid back to the Insurance Company semi-annually, with other income from that fund; is that right?

A. Yes.

Q. Now, you do not mean to say that every dollar that you received from the Insurance Company on account of Safety Fund

deposits was returned by you to the Insurance Company, do you, without taking into consideration shrinkage in value in the securities, do you?

A. Yes, sir.

Q. It was the object and purpose of the Security Company to keep the par value of the securities in its hands as a Safety Fund up to $1,000,000, was it not, and when it fell below $1,000,000 you reserved cash to make up the difference, didn't you?

A. No, sir.

Q. What did you do?

A. Paid it back to the Hartford Life Insurance Company.

210 Q. What did you do when the value of the securities in the Safety Fund fell below $1,000,000, if that ever occurred?

A. It never did occur on par value basis.

Q. So that, as regards the securities in the Safety Fund, you paid over to the Insurance Company all the income from the securities, the aggregate par value of which was $1,000,000, and in addition to that all the Safety Fund deposits which had been received by your Company from the Insurance Company?

A. I think that was the contract after the fund reached the par value of $1,000,000.

Q. What is the name of the secretary of your company?

A. Mr. Parsons is the secretary now—Francis Parsons.

Redirect examination.

By Mr. Jones:

Q. The books from which the figures are shown on Exhibit 20 were taken were kept in the regular course of business?

A. Yes.

Q. And were regularly kept and you undertook to make a true record of the transactions at the time they occurred?

A. We did.

Q. And the books are available and open to inspection to anyone who has an interest in them?

A. They are.

Mr. Jones: I proffer to these gentlemen an opportunity to examine the books of the Security Company, not only with respect to the dates shown on the tabulation, but with respect to any date and every date from the start to the finish.

Q. Mr. Bunce, I understand the important dates concerning which a showing of the Safety Fund should be made are

211 December 31, 1900,
December 31, 1901,
April 30, 1902,
June 1, 1902,
December 31, 1902,
September 30, 1906,
December 1, 1906,
December 31, 1906,

and the tabulation, being Exhibit No. 20, about which you have testified, refers only to those dates.

A. That is correct.

Q. And you made up the tabulation at the request of the representatives of the Hartford Life Insurance Company as of these dates solely, because that was the request which they made of you?

A. Yes.

Q. A similar tabulation can be made by you or by the officers or employes of the Trust Company for any date covering the period from the beginning of the Safety Fund accumulations down to this date?

A. They can.

Q. And I take it that the Security Company would be glad to do that for the gentlemen on the other side of this litigation, upon request?

A. They will.

Mr. Jones: I offer to make you up tabulations of any dates, in addition to letting you inspect the books concerning the Safety Fund of the Company."

It is hereby stipulated and agreed between counsel that the exhibits referred to in the cross-examination be considered, and the same are hereby formally introduced in evidence.

Mr. Garland S. Johnson, of lawful age, produced, sworn and examined by Mr. Jones, testified on behalf of plaintiff as follows:

Q. You are the son of the late Dr. Johnson?

A. Yes, sir.

212 Q. Where do you reside?

A. Schell City.

Q. The original of Exhibit No. 16 in this case is a letter from you to the Hartford Life Insurance Company, dated June 19, 1902, which original letter I show you. Was that letter written by you?

A. Yes, sir.

Q. Will you state to the Court how you came to write it?

By Mr. Fyke: We object to that; don't see the relevancy of that question to any issue in this case; the letter will speak for itself; I don't know what the purpose is.

By Mr. Jones: Just want to show it was written by authority.

By the Court: If that be the purpose, as to its authority, objection overruled.

A. Do you mean, Mr. Jones, was I authorized to write this?

Q. Yes.

A. No, sir; I wasn't.

Q. How did you come to write it?

A. Well, I thought we would like to take up the insurance and make a payment if we could, and I wrote it with that intention.

Q. Did your father know about it?

A. I think not.

Q. Did you ever tell him about it?
A. I told him about it after I received the reply.
Q. What did he say?
A. He said he would 'tend to it.
Q. He didn't disapprove of your writing it, after you received the reply, did he?
A. I don't remember; only he told me he would attend to it.
Q. That was after you got the reply from the company?
A. From the company, yes sir.
Q. You told your father about it promptly after writing the
213 letter—no, it was after you got the reply?
A. After I got the reply.
Q. And this reply we refer to is, I take it, the original of the letter of June 24, 1902, from Hartford Life Insurance Company, which is Exhibit 17, in which they say, "As you wrote us before, the last day of grace expired for payment of the June call, policy No. 109854, we are warranted in extending the time of payment, and have given you until July 5th to renew the policy".
A. I think that is the reply.
Q. Did you turn that over to your father when you got it?
A. Yes, as soon as I got it; I don't know how long after.
Q. But within a brief time?
A. Yes, I think.
Q. How long would you say—several days, perhaps?
A. Yes, within a few days, anyway.

Cross-examination,

By Mr. M. A. Fyke.

Q. Did you know at that time anything about the condition of this company—its Mortuary Fund, Reserve Fund or Safety Fund?
A. No; I didn't know anything about the condition of the company.

By Mr. Jones: I will stipulate, if necessary, that he didn't know anything about it.

Witness excused.

By Mr. Jones: The letter which the witness identified is a copy of one of the exhibits in the case, and has heretofore been offered.
By the Court: Exhibit 16?
By Mr. Jones: Yes, Exhibit 16.

Said Exhibit No. 16 is as follows:

214 "Copy. 16.

DEFENDANT'S EXHIBIT NO. 16,

Charles A. Safford, Notary Public.

Schell City, Mo., June 19, 1902.

Hartford Life Ins. Co., Hartford, Conn.

GENTLEMEN: My father and I both have been out of town and did not get to attend to payment due on policy 109854 Hartford Life & Annuity Ins. Co. on life of Jas. T. Johnson. I see our time expires tomorrow. What steps can we take now to make payment and have it reinstated. Father is in perfect health. I am very sorry indeed for delay but it could not possibly be avoided. Kindly let us know by return mail.

Yours very truly,

GARLAND S. JOHNSON."

Defendant rests.

This was all the evidence offered.

At the close of the evidence the defendant asked the following peremptory instruction:

"The Court instructs the jury that under the law and the evidence the plaintiff can not recover and their verdict should be for the defendant."

Which said instruction was by the Court refused.

To which ruling of the Court the defendant then and there excepted, and now excepts.

The Court gave the following instructions for plaintiff:

Instruction No. 1.

The Court instructs the jury that if you find from the evidence that at the time the defendant notified the deceased Johnson that his premium was due, and which defendant claims he failed to pay, there was a sum of money in excess of $1,000,000 in the Safety Fund mentioned in the contract, and a surplus in the Mortuary Fund mentioned in the evidence, then it was the duty of defendant to have applied such excess to the payment of premiums of policyholders; and if you find from the evidence that said Johnson's share
215 in such excess, if any, was sufficient to pay the amount of premium due at the time said notice was given to him, then defendant could not declare said insurance forfeited for the failure to pay said premium.

Instruction No. 2.

The Court instructs the jury that it devolves upon the defendant to prove that it was necessary, at the time it claims an assessment

was made, for failure to pay which it claims the insurance was forfeited, to make an assessment, and that an assessment was made by the directors of defendant, and that said assessment was not for a larger amount than was necessary to pay the death losses which had accrued up to that time, after giving said Johnson credit for his pro rata share of the excess in the Safety Fund over $1,000,000, if you find there was such excess, and in the Mortuary Fund, if you find there was excess in that fund, and unless defendant has so proven, it can not declare said insurance forfeited.

Instruction No. 3.

The Court instructs the jury that if you find from the evidence there was on hand in said Safety Fund a sum in excess of $1,000,000, and if you find also there was in the hands of defendant a Mortuary Fund, which had been collected from previous assessment, then it was the duty of defendant to have applied such excess in said Safety Fund and said Mortuary Fund to the payment of death claims which had matured prior to the time the notice was given to Johnson that his premium was due, for failure to pay which defendant claims said insurance was forfeited, and if defendant failed to so apply said money, then it can not claim that the insurance is forfeited.

Instruction No. 4.

If you find for plaintiff you will allow interest on the amount of the policy at 6 per cent from the 4th day of July, 1907, and
216 if you will find for plaintiff, you will add the several amounts together in your verdict, so as to make one aggregate sum.

To the giving of which said instructions and each of them the defendant then and there objected and excepted, and now excepts.
The Court gave the following instruction for defendant:

Instruction No. 5.

The Court instructs the jury that there is no evidence in this case that the refusal of the defendant to pay the sum sued for was vexatious, and even though you should find for the plaintiff, you will not, in your verdict, allow any sum by way of damages or attorney fees.

The Court gave the following instruction of its own motion:

The Court instructs the jury that when three-fourths or more of your number, that is to say, nine or more of your number, shall agree upon a verdict, the same may be returned, as the verdict of your number, and when so agreed to by nine or more of your number, and not by all of your number, said verdict should be signed by the jurors agreeing thereto, and not by the foreman, in his capacity as foreman of the jury; but, on the other hand, when said verdict is agreed to by all of your number, then said verdict should be signed simply by the foreman in his capacity as foreman of the jury.

And afterwards, on the same day, to-wit, the 12th day of May, 1909, the jury returned a verdict in favor of the plaintiff, which verdict was in words and figures as follows, to-wit:

217 We, the jury, find for the plaintiff in the sum of $5,556.66, Five Thousand Five Hundred and Fifty-six Dollars and Sixty-six Cents.

J. E. WRIGHT, *Foreman.*

And afterwards, within the statutory time, to-wit, on May 13, 1909, during the same term and within four days after said verdict was rendered, came defendant by attorneys herein, and filed motion for new trial, which motion is as follows:

In the Circuit Court of Henry County, Mo., May Term, 1909.

NANNIE M. JOHNSON, Plaintiff,

vs.

HARTFORD LIFE INSURANCE COMPANY, Defendant.

Now, at this day comes the defendant and moves the Court to set aside the verdict rendered in the above entitled cause and grant defendant a new trial of said cause, for the following reasons, to-wit:

1. Because the verdict is against the evidence and because the verdict is against the weight of the evidence.
2. Because the verdict is against the law; and because the verdict is against the law and the evidence.
3. Because the verdict is for the wrong party.
4. Because the Court erred in admitting against the objections of the defendant, incompetent and immaterial evidence offered in behalf of plaintiff.
5. Because the Court erred in refusing to admit competent, relevant and material evidence offered in behalf of defendant.
6. Because the Court erred in refusing to give the instruction in the nature of a demurrer to the evidence, offered at the close of plaintiff's case and because the Court erred in refusing to give the
218 instruction in the nature of a demurrer to the evidence offered at the close of the entire case.
7. Because the Court erred in admitting in evidence the reports of the defendant made to the Insurance Department of the State of Missouri from time to time, and in admitting each of said reports.
8. Because the Court erred in giving, over the objection of the defendant, the instructions asked and given on behalf of plaintiff, and in giving each of said instructions.
9. Because the Court erred in refusing to give the jury that instruction by the defendant to the effect that there was no evidence of vexatious delay in this case, and that therefore they should not include in their verdict either damages or attorney's fees.
10. Because the instructions given by the Court are conflicting

and inconsistent, illegal and erroneous, and beyond the issues made by the pleadings.

11. Because, in admitting in evidence the reports made by the defendant to the Insurance Department and each of them, and in submitting this case to the jury upon issues which are not made by the pleadings, and in instructing the jury that they were authorized to find for the plaintiff upon proof and evidence not within the issues made by the pleadings, and by the verdict thereunder and the judgment on said verdict, the defendant was, and has been and is being, deprived of its property without due process of law, and denied the equal protection of the laws, contrary to the provisions and inhibition of the fourteenth amendment to the Constitution of the United States, and contrary to the provisions and inhibitions of Section 3 of Article 11 of the Constitution of Missouri.

12. Because the damages assessed by the jury are excessive.

13. Because, on the entire record and on the pleadings and the evidence, the verdict should have been for the defendant instead of plaintiff.

C. C. DICKINSON & SON,
JONES, JONES, HOCKER & DAVIS,
Attorneys for Defendant.

219 Which said motion was taken by the Court under advisement and continued from time to time until the 13th day of September, 1909, during the September term of said court, and the same was by the Court overruled, to which action of the Court, in so overruling said motion for new trial, the defendant then and there excepted and now excepts.

Afterwards, on the same day and during the same term, the Court, by an order duly entered of record, extended the time in which defendant might file its bill of exceptions in this cause until and including the 11th day of January, 1910.

And afterwards, and within the time for filing the bill of exceptions heretofore granted for good cause shown, and by consent of parties, time for filing bill of exceptions is by the Court extended to during the May Term, 1910, of this court.

Afterwards, on the same day, to-wit, on the 13th day of September, 1909, defendant filed herein its affidavit for appeal, which affidavit is as follows:

STATE OF MISSOURI,
County of Henry, ss:

In the Circuit Court, September Term, 1909.

NANNIE M. JOHNSON, Plaintiff,
vs.
HARTFORD LIFE INSURANCE COMPANY, Defendant.

Affidavit for Appeal.

STATE OF MISSOURI,
County of Henry, ss:

C. C. Dickinson, attorney and agent for the above named defendant, Hartford Life Insurance Company, being duly sworn, makes oath and says that the appeal prayed for in the above entitled cause is not made for vexation or delay, but because
220 the affiant believes that the appellant is aggrieved by the judgment or decision of the Court.

C. C. DICKINSON.

Subscribed and sworn to before me this 13th day of September, 1909.

R. L. COVINGTON,
By S. L. GRINSTEAD, *D. C.*

And at the same time, the defendant deposited with the clerk of said court the $10 filing fee required by law, and the Court having duly considered said application, an appeal was granted to the defendant to the Kansas City Court of Appeals.

And now, within the time allowed by the Court, comes the defendant and presents this, its bill of exceptions herein, and prays that the same may be signed, sealed, filed and made a part of the record herein; all of which is accordingly done this 2d day of May, 1910, of the May, 1910, Term.

C. A. DENTON, [SEAL.]
Judge of 29th Judicial Circuit of Missouri.

The foregoing bill of exceptions, including the two slips pasted thereon on pages 58 and 212, thereby made part of this bill of exceptions, is hereby approved.

PARKS & SON,
FYKE & SNYDER,
Attorneys for Respondent.
JONES, JONES, HOCKER & DAVIS,
Attorneys for Defendant, Appellant.

Filed May 2, 1910. R. L. Covington, Circuit Clerk, by S. L. Grinstead, Dep.

15—742

221 That the brief of appellant filed in the Kansas City Court of Appeals and transferred to the Supreme Court of the State of Missouri, which contains a certified copy of the judgment or decree in the case of Charles H. Dresser, et al, vs. the Hartford Life Insurance Company of Hartford, Connecticut, et al, rendered by the Superior Court of New Haven County, Connecticut, is in the words and figures following, to-wit:

222 In the Kansas City Court of Appeals, October Term, 1910.

No. 9402.

NANNIE M. JOHNSON, Plaintiff & Respondent,

vs.

HARTFORD LIFE INSURANCE COMPANY, Defendant & Appellant.

Appeal from the Circuit Court of Henry County, Missouri.

Appellant's Statement, Brief and Argument.

Statement.

This is an appeal by the defendant from a judgment against it for $5,556.66.

The petition is on a certificate of membership in the nature of a policy of life insurance issued on the life of Dr. James T. Johnson, in which the plaintiff, Nannie M. Johnson, is the designated beneficiary (Rec., p. 2).

The issuance of the certificate and its continuance in force until 1902, the death of Dr. Johnson in January, 1907, and waiver
223 of proofs of death were conceded.

The answer (Rec., p. 4) pleaded affirmatively that the certificate was conditional upon the payment of periodical assessments, that five years before Johnson's death an assessment (call 95) was levied against him for $74.55; that the call was dated May 2, 1902; that it became due by the terms of the certificate on June 1, 1902 (with a grace period expiring June 20, 1902); that time for payment of this assessment was extended at Dr. Johnson's request to July 5, 1902, notwithstanding which extension Dr. Johnson refused to pay said assessment and thereupon, in consequence, the insurance was, by the terms of the certificate, forfeited and thereafter for five years prior to his death Dr. Johnson acquiesced in such forfeiture (Rec., pp. 8, 9, 10).

The reply was a general denial of the affirmative defenses (Rec., p. 12).

The certificate issued to Dr. Johnson is for $5,000 (Rec., p. 77), and provides that it is issued "in consideration of the payment of all mortality calls, proportioned to the said indemnity, levied against the herein named member to form a Mortuary Fund for the payment

of all indemnity matured by deaths of members and to create a Safety Fund as hereinafter described, which mortality calls, to be levied upon all the members in the department wherein this certificate is issued whose certificates are in force at the dates of such deaths, shall be made according to the table of graduated mortality ratios given hereon, and as further determined by their respective ages and the aggregate indemnity at the date of such deaths, with due
224 allowance for the discontinuance of membership (one-third of the proceeds of such mortality calls to be applied towards the Safety Fund until the sum of ten dollars on each $1,000 of indemnity shall have been thus applied, when the basis of all subsequent mortality calls shall be two-thirds only of the table given hereon)."

"The member agrees to pay the company, for expenses, dues of three dollars per annum on each $1,000 of indemnity on the first of the month after issue thereof, and at every anniversary thereafter, so long as this certificate shall remain in force, or by pro rata installments of the same, in advance, for periods of less than one year" (Rec., p. 79).

"The member agrees to pay said company, within thirty days from the day on which notices bear date, all mortality calls determined as herein set forth, the proceeds of which, less such charges as are herein prescribed and ten cents on each call for cost of collection, and less also one-third of each mortality call until the sum of ten dollars on each $1,000 of indemnity has been paid and applied to the within described Safety Fund, shall form the Mortuary Fund. But if the laws of any country, state, county or municipality shall require a tax to be paid by said company on account of such payments, then the mortality calls hereon shall be determined so as to cover such tax" (Rec., p. 79).

"The quarter days for the payment of mortality calls shall be the first day of March, June, September and December in each year, notices of which will be dated and mailed thirty days before such dates" (Rec., p. 80).

The certificate further provided that "said company shall
225 deposit said sum of ten dollars, when received, with the trustee named in a contract made with it (a copy of which is printed hereon) as a safety fund, in trust for the uses and purposes expressed in said contract; and shall make a semi-annual division of the net interest received therefrom by it, pro rata among all the holders of certificates in force in said department at such times, who shall have contributed five years prior to the date of any such division their stipulated proportion of said fund, by applying the same to their future dues and assessments; and that whenever said fund shall amount to one million dollars, all subsequent receipts therefor shall be divided by said company in like manner as the interest" (Rec., p. 78).

Attached to the certificate, and made a part thereof, is the Trustee's Contract referred to in the policy (Rec., p. 82).

The Trustee's Contract, attached to this certificate of membership,

is dated December 31, 1879, and is between the Hartford Life Insurance Company (party of the first part) and the Security Company (party of the second part) and recites that whereas the party of the first part purposes to issue to persons contracting therefore certificates of membership in a special department of its business to be known as the Safety Fund Department and in consideration of the sum of $10 to be received on each $1,000 of each and every such certificate for the purpose of creating a Safety Fund, therefore, the party of the second part is appointed trustee and the first party agrees to deposit said sum of ten dollars when received on each said $1,000 certificate with said second party as trustee until said fund amounts to one million dollars; and the party of the second part covenants and agrees with the party of the first part and with each of the
226 holders of the aforesaid certificates to hold and manage said fund and invest the same in United States bonds. Then follow provisions for the investment of "such fund" and "said fund" and for distribution of the interest on the fund to the members in reduction of assessment after five years or whenever the fund shall amount to $300,000 in par value of United States bonds and for the accumulation and investment of all ten-dollar contributions by members to said fund "received from the party of the first part, exclusive of the income therefrom, until the whole fund shall amount in such bonds, at their par value, to one million dollars" (Rec., p. 84).

The certificate being for $5,000 of indemnity the assessment was for five times two-thirds of the amount shown by the table, plus $3.75, the quarterly dues, (5×$3÷4), plus $1.40, the tax levied and paid the State of Missouri, the total amount assessed being $74.55 (Rec., p. 8).

No question was made below of the fact that this assessment was levied or as to the method of calculation or the correctness of the computation, and it was conceded that Dr. Johnson received the notice sent to him on May 2, 1902 (Rec., p. 97), with the list of deaths for which the assessment was levied (Rec., p. 101) in due course of mail, to-wit, on May 4, 1902 (Rec., p. 164), and the second notice sent June 10, 1902, by registered mail on June 12, 1902 (Rec., p. 164).

On June 19, 1902, Garland Johnson, the son of Dr. Johnson (with his approval), wrote the company:

"My father and I have both been out of town and did not attend to the payment due on policy 109854. * * * I see our time expires tomorrow. What steps can we now take to make the pay-
227 ment and have it reinstated? Father is in perfect health. I am sorry indeed for the delay, but it could not possibly be avoided. Kindly let us know by return mail" (Rec., pp. 119, 212).

The company responded June 24, 1902:

"As you wrote us before the last day of grace expired for payment of the June call, policy No. 109854, we are warranted in extending the time of payment, and have given you until July 5 to renew the policy. If, therefore, you wish to remit us $75.05 on or before that date the policy will be kept in force" (Rec., p. 120).

The contention of the plaintiff was that the forfeiture provided by the certificate for the non-payment of call 95 did not occur, because, she alleged, that call was void.

The reasons asserted why call 95 was void were:

1. That the Safety Fund then exceeded $1,000,000.
2. That there was then a surplus in the Mortuary Fund.
3. That Dr. Johnson's share of the alleged excess or surplus in these funds was sufficient to pay the amount of call 95 ($74.55).
4. That no assessment was necessary when call 95 was levied.
5. That the assessment levied was for a larger amount than was necessary.
6. That the assessment was not levied by the Board of Directors.

Safety Fund.

The undisputed and indisputable proof was that the Safety Fund provided for by this policy (the fund created by and pursuant
228 to the Trustee's Contract of December 31, 1879, attached to the policy sued on) did not exceed $1,000,000, par value, at the time call 95 was levied (May 2, 1902) (See Rec., pp. 205, 137, 146, 147, 196, 197).

The plaintiff's contention to the contrary was based on the statements made concerning the Safety Funds of the association found in the annual reports of the company to the Insurance Department of Missouri for the years 1900, 1901 and 1902 (Rec., pp. 22 and 23; 28 and 29; 36 and 37).

In these reports are the following statements:

(1900 Report—December 31, 1900.)

(Rec., p. 22) Safety Fund in Security Company.....	$1,194,529.14
(Rec., p. 22) Depreciation Safety Fund............	81,960.00
(Rec., p. 23) Net Safety Fund in Security Company..	$1,112,569.14

(1901 Report—December 31, 1901.)

(Rec., p. 29) Safety Fund in Security Company.....	$1,201,236.00
(Rec., p. 29) Depreciation Safety Fund...........	34,330.98
(Rec., p. 30) Net Safety Fund in Security Company..	$1,166,905.02

(1902 Report—December 31, 1902.)

(Rec., p. 36) Safety Fund in Security Company.....	$1,210,892.23
(Rec., 36) Depreciation Safety Fund..............	34,330.98
(Rec., p. 37) Net Safety Fund in Security Company.	$1,176,561.25

The plaintiff also introduced the annual reports for the years 1903, 1904, 1905 and 1906, all of which are long subsequent to the

forfeiture for non-payment of call 95, of date May 2, 1902.
229 These reports, admitted over objection, contain statements that the Safety Funds (i. e.), both the women's and the men's Safety Funds) aggregated in each of these years something over $1,200,000, but further reference to these reports seems unnecessary, as they cannot possibly shed any light on the condition of these funds in 1902.

The record shows (and the proof is undisputed) that on June 30, 1882, the company established a branch, division or department for women, and that on that day it entered into another and distinct contract with the Security Company of Hartford which provided for the creation of another and distinct Safety Fund different in amount, character and beneficiaries, and made up entirely of contributions from female risks to be known as the "Women's Division of the Safety Fund System" (Rec., p. 138).

The original Safety Fund (Men's Division), limited to $1,000,000, was created and maintained solely by contributions from male risks and pursuant to the contract with the Trustee dated December 31, 1879 (Rec., pp. 127 and 137).

The Safety Fund of the Women's Division, limited to $250,000, was created and maintained solely by contributions from female risks pursuant to the contract with the Trustee, dated June 30, 1882 (Rec., pp. 127 and 137).

The certificate of membership issued on each female risk specified that she (the certificate holder) was a member of the Women's Division (Rec., p. 128) and provided for the payment of assessments only upon members of the "Women's Division of the Safety Fund Department" and for a Mortuary Fund of the Women's Division (Rec., p. 128), and for the deposit with the Trustee as a
230 Safety Fund for the Women's Division of ten dollars for each $1,000 certificate, pursuant to the Trustee's Contract of June 30, 1882, until said fund of the Women's Division should amount to $250,000, and for distribution of the earnings of the fund in reduction of assessments whenever this fund should aggregate $75,000 (Rec., pp. 127, 128).

The Trustee's Contract attached to each certificate in the Women's Division (Rec., p. 133) is dated June 30, 1882, and recites that whereas the party of the first part, the Insurance Company, "purposes to issue to persons contracting therefor, certificates of membership in a special department of its business to be known as the Women's Division of the Safety Fund System" and the proposed payment of ten dollars on each $1,000 certificate "for the purpose of creating a Safety Fund in connection therewith," therefore the party of the first part agrees to deposit with the party of the second part as Trustee, as soon as received, the sum of ten dollars on each $1,000 certificate issued in the aforesaid division until said fund amounts to $250,000. The Trustee agrees to manage, hold and invest said fund in such securities as may be approved by the Insurance Department of Connecticut and after five years, or when said fund shall amount to $75,000, to pay over the income from said fund to be

applied in reduction of the assessments against certificate holders in the Women's Division (Rec., p. 134).

(The rate table attached (Rec., p. 136) is different in its ratios from the table in the certificate sued on and provides for an assessment of four times the table so long as the indemnity is less than $250,000.)

From 1879, when the Men's Division was inaugurated, but
231 one Safety Fund was maintained. After 1882, when the Women's Division was inaugurated, two Safety Funds were maintained (Rec., pp. 127, 137).

The Trustee in each Trustee's Contract was the same—the Security Company of Hartford.

The two Safety Funds were kept separate from each other (Rec., pp. 127, 137). Separate assessments were levied in the Women's Division from the assessments levied in the Men's Division (Rec., pp. 141, 193).

On May 2nd, when call 95 was levied, the amount in the Safety Fund Men's Division, par value, was $1,000,000 (Rec., p. 137), and the amount in the Safety Fund, Women's Division, par value, was $118,879.72 (Rec., p. 137, 205).

The records of the Security Company and its officers corroborating the testimony from the Insurance Company establish the following:

April 30, 1902.	Book Value.	Par Value.	
Men's Div. Principal...	$1,056,354.04	$1,000,000.00	(Rec., 205)
Women's Div. Principal	124,776.41	118,879.72	(Rec., 205)
Men's Div. Income....	13,751.14		
Women's Div. Income.	128.83		
June 1, 1902.			
Men's Div. Principal...	$1,056,654.00	$1,000,000.00	(Rec., 205)
Women's Div. Principal	124,776.41	118,879.72	(Rec., 205)
Men's Div. Income....	17,003.86		
Women's Div. Income.	503.83		

The foregoing figures are absolutely unrefuted by anything in the record.

The contention of the plaintiff to the contrary rests wholly on the reports to the Insurance Department. These reports were introduced for the years 1900 to 1906, but only the reports for 1900, 1901 and 1902 can throw any light on the condition of the Safety Funds in May, 1902, when call 95 was levied.

The following is a comparison of the proof introduced with these reports year by year:

232 Safety Fund on Deposit in Surety Company.

Proof:

1900 (Dec. 31).	Book value.	Par value.
Men's Div. Principal...	$1,041,285.29	$1,000,000.00 (Rec., 205)
Women's Div. Principal	120,234.13	116,670.47 (Rec., 205)
Men's Div. Income....	30,820.96	
Women's Div. Income..	2,188.76	
Total..........	$1,194,529.14	

Report:

Reported to Ins. Dept..	1,194,529.14	(Rec., 23)

Proof:

1901 (Dec. 31).	Book value.	Par value.
Men's Div. Principal...	$1,053,394.04	$1,000,000.00 (Rec., 205)
Women's Div. Principal	124,765.16	119,035.72 (Rec., 205)
Men's Div. Income....	23,055.11	
	$1,201,214.31	
Women's Div. Income (Overdraft)	140.81	
Total..........	$1,201,073.50	

Report:

Reported to Ins. Dept..	1,201,236.00	(Rec., 29)

Proof:

1902 (Dec. 31).	Book value.	Par value.
Men's Div. Principal...	$1,056,940.29	$1,000,000.00 (Rec., 205)
Women's Div. Principal	126,562.86	120,401.61 (Rec., 205)
Men's Div. Income....	25,096.92	
Women's Div. Income..	2,292.66	
Total..........	$1,210,892.73	

Report:

Reported to Ins. Dept..	1,210,892.23	(Rec., 36)

This evidence demonstrates beyond the possibility of cavil that the annual reports refer to the aggregate of two funds and to both principal and income and that the parvalue of the Safety Fund

(Men's Division) in which Dr. Johnson was interested, did not exceed $1,000,000.

The income from the Safety Fund was regularly paid over to the company and by it applied as credits to Dr. Johnson and the other members, as credits against their assessments or calls (Rec., pp. 121, 123, 124).

The Mortuary Fund.

The certificate issued to Dr. Johnson expressly provides that the assessments are to be levied to "form a Mortuary Fund" (Rec., p. 77).

233 The assessments as levied were deposited in bank to an account designated "Mortuary Fund" and from this fund death claims were paid from time to time (Rec., p. 116).

During some years the disbursements from the Mortuary Fund were greater than the Mortuary Calls and some years they were less (Rec., p. 116).

What remained in this fund from time to time is designated in the record as "balances in the Mortuary Fund" or "mortuary balances" (Rec., pp. 163, 164).

The death losses approximated $100,000 per month (Rec., p. 115).

The process of levying each assessment, tabulating the membership (which was constantly changing, both by addition and elimination of individuals and by the increasing age of each persistent member), and apportioning to each his mathematical proportion of the gross amount levied, consumed about thirty days before the notice was sent (Rec., p. 114), and each member had from 30 to 45 days in which to pay his assessment (Rec., pp. 114, 115). As a necessary consequence there were always the death losses of from 60 to 85 days unassessed for before the members are required to pay the assessment levied, i. e., a minimum of 30 days unassessed for (before the notices of the assessment are mailed) and, in actual experience, a period of about 45 days before the members begin to pay any substantial part of the assessment (Rec., p. 114).

With from 30 to 85 days' death losses unprovided for some "balance in Mortuary Fund" was essential in order to meet death losses aggregating $100,000 per month, and a balance was constantly maintained, at times being as low as $40,000 (Rec., p. 117),
234 and at other times (about the "due dates" of assessments) running as high as $180,000, but at all times the outstanding losses were from three to ten times the amount of these mortuary balances (Rec., p. 117).

The assessments were levied quarterly (Rec., p. 115). Payment is required 30 days later (with a grace period of from 4 to 20 days). (Rec., p. 115.) The balances in the Mortuary Fund are consequently larger when the assessments are being paid and smaller when no assessments are being paid and previous assessments are being, or have been, used to liquidate death losses (Rec., p. 117).

When Call 95 was levied the balance in the Mortuary Fund was

\$47,462.17; the outstanding death losses were \$444,601.05 (Rec., p. 117).

The records of the defendant company so show, the officers of the defendant so testify, and this evidence is absolutely undisputed.

The contention to the contrary is based on the statements in the annual reports for the period ending December 31st, 1900, 1901 and 1902.

In these reports appear the following statements with respect to Mortuary Funds:

235 (Rec., p. 23, 1900 Report: Mortuary Fund held in addition to reserve	\$111,495.36
(Rec., p. 28) 1901 Report: Mortuary and other funds in addition to reserve	116,313.59
(Rec., p. 37) 1902 Report: Special Reserve and surplus on Safety Fund Policies	352,640.92

The undisputed testimony shows as follows:

(Rec., p. 144) in 1900 the Men's Mortuary balance was	\$ 89,461.38
(Rec., p. 144) The Women's Mortuary balance was	21,903.20
	\$111,364.58
(Rec., p. 144) in 1901 the Men's Mortuary balance was	\$88,868.99
(Rec., p. 144) the Women's Mortuary balance was	43,858.98
	\$132,727.97
(Rec., p. 144) in 1902 the Men's Mortuary balance (surplus) was	\$126,858.76
The Women's Mortuary balance (surplus) was	41,622.73
The reserve on stipulated prem. policies was	184,159.43
	\$352,640.92

Stipulated Premium Certificates.

Being authorized by its charter to "make contracts upon any and all conditions appertaining to and connected with life risks", the company commencing in 1894, began to write Stipulated Premium contracts (Form 4 Certificates) by which certificates the premiums are fixed and level for a period of seven years (Rec., pp. 8, 9, 96).

236 During the first seven years of these certificates the holders of them made no contributions to the Mortuary Fund of the Safety Fund Department, the lossess on this form of contract were not taken into account or included in the assessments or calls levied in the Safety Fund Department, and they were not assessed with the members of the Safety Fund Department. The holders of these certificates, during the first seven years, did not participate in the

benefits of either the Mortuary Fund or the Safety Fund of the Safety Fund Department (Rec., p. 89).

The holders of these certificates did, however, contribute to the Safety Fund $2 per year for each one thousand dollars of insurance during the first seven years, or a total of $14, which was paid into the Safety Fund, as against $10 per thousand paid in by each member holding other forms of certificates (Rec., p. 87).

During the first seven years the death losses among the holders of these 7-year certificates were paid from the net premium receipts from this class of certificates, and in the event the receipts during the first seven years exceeded the death losses this excess was apportioned as a dividend and credited to the holders of these contracts (Rec., p. 88), and if there was a deficiency they were subject to a special assessment to cover this deficiency (Rec., p. 91).

At the end of seven years of membership the holder of this form of certificate, having then contributed $14 to the Safety Fund, was transferred to and then became a member of the Safety Fund Department, and was thereafter assessed at his then attained age, just as were the other members of the Safety Fund Department,
237 and received his dividend from the Safety Fund as did the
other members of that department (Rec., pp. 91, 106).

During the first seven years the excess of net premium receipts over the death losses paid on this form of policy was carried by the company and charged as a liability, designated in the several reports to the Insurance Department as "Reserve on Safety Fund Policies," "Special Reserve on Safety Fund Policies," and these items in the reports refer exclusively to the excess payments made during the first seven years on this form of certificate.

The Several Forms of Certificates in Safety Fund Department.

In the Men's Division, Safety Fund Department, there are three general forms of certificates:

First. The Regular Safety Fund certificate, such as was held by Dr. Johnson, the issuance of which began in 1880, and which provides for assessments at attained age at rates, shown by the table attached to Dr. Johnson's certificate, beginning at age 21 with a ratio of 73 cents and ending at age 65 with ratio of $4 (Rec., p. 86). Use 2/3 of figures found in table, as per consideration clause of contract. (Rec., p. 77.)

Second. The "Form 3" certificate, the issuance of which began in 1894, and which is substantially the same as the Regular Safety Fund certificate, but varies from it in the table of rates attached, which provides for assessments at attained age, beginning at age 21 with a ratio of 74 cents and ending at age 65 with a ratio of $6.24 (Rec., p. 96).

Third. The 7-Year Stipulated Premium Certificate (Form 4), the provisions of which have been heretofore stated and which
238 after the first 7 years went into the Safety Fund Department
and which was thereafter assessed at the then attained age at the same ratio as the "Form 3" Certificate (Rec., p. 89).

How Assessments Are Levied.

Assessments or Mortuary Calls are levied regularly each quarter as of date the first week-day of February, May, August and November of each year (Rec., p. 115), assessments in the Men's Division being entirely separate from those in the Women's Division (Rec., pp. 141, 193).

The data necessary for apportioning the assessment levied involves the ascertainment of the then age of each member to be assessed and the amount of insurance in force at each age between the ages 21 and 65, these being the ages at which varying ratios will be found in the rate tables.

The compilation of this data, the apportionment of the assessment and the preparation and mailing of a notice to each member (some 25,000) requires practically 30 days (Rec., p. 114). Consequently, the assessment is based upon conditions as they exist thirty days before the assessment is dated (in order that the assessment may be mailed promptly on or before the day of its date) and the assessment itself is not required to be paid until from 30 to 45 days after its date, the time limited for payment depending upon the distance of the member's residence from the home office of the company (Rec., p. 114).

A separate calculation is required for the proportion of the assessment to be paid by the men holding Regular Safety Fund Certificates from the calculation made for the "Form 3" and the
239 "Form 4" (Seven-Year) Certificates, because the ratios of
the Regular Safety Fund Certificates are different and lower than the ratios of the "Form 3" and "Form 4" Certificates; and, while the ratios of the "Form 4" Certificates are identical with the ratios of the "Form 3" Certificates (Rec., pp. 110, 111), the invariable practice of the company has been to make the calculation separately.

A list of ages (21 to 65) having been prepared there is set out against each age the ratio found in the table of Regular Safety Fund Certificates; and against such ratios there is then set out the amount of insurance in force under such policies at each age in the table. The gross amount of insurance in force at each age is then multiplied by the ratio of that age and the product (the amount of insurance in force at such age multiplied by the ratio of that age) is the amount that will be realized by an assessment of one rate or ratio upon all the members of that age holding regular Safety Fund Certificates. This process having been gone through as to each age up to 65 years, the several products thus obtained are summed up and the result is the amount that will be realized by an assessment of one rate upon all members holding Regular Safety Fund Certificates (Rec., pp. 104, 105).

Similar calculations are made for the "Form 3" and the "Form 4" Certificates (the latter of which included only such 7-year stipulated premium certificates as had then been in force for 7 years or

more and which had theretofore contributed \$14 per thousand of insurance to the Safety Fund (Rec., pp. 87, 88—Rec., pp. 105, 106).

The aggregated totals of these three calculations gives the amount
that will be realized by an assessment of one rate upon all
240 the members of the Safety Fund Department (Rec., pp.
106, 107).

These initial calculations proceed on the assumption, of course, that all the members will pay the assessment. But as lapse or discontinuance of membership (as the result of death or voluntary withdrawal) is inevitable (and is contemplated by the contract), an arbitrary deduction is assumed (generally 3 to 5%) to cover this lapsation (Rec., pp. 107, 166, 167, 168, 169).

If, after such allowance for lapsation, the death losses to be met, for which the assessment is levied, are greater than the net amount of an assessment of one rate, thus calculated, the assessment must be multiplied by as many times as the aggregate of such death losses exceeds the amount of an assessment of one rate on all the members, Men's Division, of the Safety Fund Department (Rec., p. 108).

How Call 95 was Levied.

On April 1, 1902, thirty days before Call 95 was sent out (that call being dated and mailed May 2, 1902, Rec., pp. 97, 98), the amount of deaths among the men's Safety Fund Department, for which no assessment had previously been made, aggregated \$362,500, a list of which will be found at Rec. p. 101.

The original tabulations just outlined, prepared as to all the members of the division, were produced and offered in evidence and will be found at pp. 105 to 112 of the record.

The gross amount that would be realized by an assessment paid by all members was as follows:

241

Regular Safety Fund Certificates	\$95,950.79
"Form 3" Certificates (Reg. Safety Fund, with higher rates)	1,671.37
"Form 4" (Transferred Stip. Prem. Certificates).....	2,829.74
Total..............................	\$100,451.90

(Rec., p. 107.)

An allowance for lapsation or discontinuance of membership was assumed (as contemplated by the policy sued on), and the assumption was 5%, thus reducing the net amount of an assessment of one rate on the entire membership to \$95,429.30 (Rec., p. 107).

As there was an aggregate of \$362,500 of deaths unassessed for, this amount was divided by \$95,429.30 and the result was 3,798, or (discarding the third decimal) 3 8/10, which was the number of times an assessment of one rate would have to be multiplied in order to re-

alize $362,500 on the assumption that 5% of the membership would lapse (Rec., pp. 107, 111).

How Call 95 was Apportioned to Dr. Johnson's Policy.

Dr. Johnson's age for assessment was 64. (He was in fact 65, but the company had by some oversight rated him as one year younger, and no contention is made that he should have been assessed as of age 65.) (Rec., p. 112).

The ratio for Regular Safety Fund certificate holders at age 64 is $3,654 (being the ratio specified in his certificate, 2/3 of the ratio opposite age 64=$5.48-:-2/3=$3.654). This sum, $3.654, being multiplied by the rate of 3.8, found to be necessary by the calculation
for Call 95, gives $13.88 (Rec., p. 112). This amount mul-
242 tiplied by the number of thousands in force gives $69.40. To
this is added $3.75, one-fourth of the annual dues of $15,00 provided by the certificate (Rec., p. 79) and $1.40 taxes paid the State of Missouri on this assessment, making a total of $74.55, the amount for which notice was sent (Rec., p. 113).

The foregoing calculation is mathematically stated as follows:

Ratio in table $5.48-:-2/3=$3.654.

$3.654	
3.8	(Rate of Assessment Call 95.)
$13.88	
5	(Thousand of insurance.)
$69.40	
3.75	(Quarter Annual Dues.)
1.40	(Taxes.)
$74.55	Total Assessment.

Acquiescence in Forfeiture.

That the two notices of the levy of Call 95 were received by Dr. Johnson is abundantly proven and conceded on the record (Rec., p. 164).

The last day for the payment of this call was June 20th. On June 19th, Garland S. Johnson, the son of Dr. Johnson, wrote the company a letter, which reads as follows:

"Schell City, Mo., June 19, 1902.

Hartford Life Ins. Co., Hartford, Conn.

GENTLEMEN: My father and I both have been out of town and did
not get to attend to payment due on policy 109854, Hartford
243 Life & Annuity Insurance Co., on life of Jas. T. Johnson. I
see our time expires tomorrow. What steps can we take now to make payment and have it reinstated. Father is in perfect health.

I am very sorry indeed for the delay, but it could not possibly be avoided. Kindly let us know by return mail.

Yours very truly,

GARLAND S. JOHNSON."

(Rec., p. 119.)

In reply to this the company wrote to Mr. Johnson the following letter:

"June 24, 1902.

Garland S. Johnson, Schell City, Mo.

DEAR SIR: As you wrote us before the last day of grace expired for payment of the June call, policy No. 109854, we are warranted in extending the time of payment, and have given you until July 5th to renew the policy. If, therefore, you wish to remit us $75.05 on or before that date, the policy will be kept in force.

Yours truly,

E. A. WRIGHT,
Chief Clerk."

(Rec., p. 120)

Concerning these letters Garland S. Johnson was called as a witness (Rec., p. 211) and testified that he wrote the first letter because his father was out of town; that after he got the company's reply he told his father about it and his father said he would attend to it; that he told him promptly and within several days after the receipt of the letter. After this time, Dr. Johnson made no payments, and
244 attempted to make none, and thereafter the company sent to
Dr. Johnson no notices of assessments and had no further communications with him. Dr. Johnson lived for five years after this date.

The Trial.

At the close of the case the defendant offered a demurrer to the evidence, which was overruled.

The Court then gave the following instructions, of which the defendant complains (Rec., p. 214):

(No. 1.)

"The Court instructs the jury that if you find from the evidence that at the time the defendant notified the deceased Johnson that his premium was due, and which defendant claims he failed to pay, there was a sum of money in excess of $1,000,000 in the Safety Fund mentioned in the contract, and a surplus in the Mortuary Fund mentioned in the evidence, then it was the duty of defendant to have applied such excess to the payment of premiums of policyholders; and if you find from the evidence that said Johnson's share in such excess, if any, was sufficient to pay the amount of premium due at

the time said notice was given to him, then defendant could not declare said insurance forfeited for the failure to pay said premium." (Rec., p. 214.)

(No. 2.)

"The Court instructs the jury that it devolves upon the defendant to prove that it was necessary, at the time it claims an assessment was made, for failure to pay which it claims the insurance was forfeited, to make an assessment, and that an assessment was made by the directors of defendant, and that said assessment was not for a larger amount than was necessary to pay the death losses which had accrued up to that time, after giving said Johnson credit for his
245 pro rata share of the excess in the Safety Fund over $1,000,000, if you find there was such excess, and in the Mortuary Fund, if you find there was excess in that fund, and unless defendant has so proven, it cannot declare said insurance forfeited." (Rec., p. 215.)

(No. 3.)

"The Court instructs the jury that if you find from the evidence there was on hand in said Safety Fund a sum in excess of $1,000,000, and if you find also there was in the hands of defendant a Mortuary Fund, which had been collected from previous assessments, then it was the duty of defendant to have applied such excess in said Safety Fund and said Mortuary Fund to the payment of death claims which had matured prior to the time the notice was given to Johnson that his premium was due, for failure to pay which defendant claims said insurance was forfeited, and if defendant failed to so apply said money, then it cannot claim that the insurance is forfeited." (Rec., p. 215.)

There was no evidence upon which the jury could legitimately find that there was any excess in either the Safety Fund or in the Mortuary Fund and no evidence from which they could determine what was "Dr. Johnson's share of such excess," if there was an excess in either the Safety Fund or the Mortuary Fund, and there is nothing in the record which justified the trial Court in imposing on defendant the burden of proving that there was no "necessity for an assessment," or that the "assessment was not for a larger amount than was necessary."

The jury returned a verdict for plaintiff for $5,556.66. Defendant's motion for new trial (Rec., p. 217) was overruled and defendant appealed (Rec., p. 219).

246 *Points and Authorities.*

I.

The Court should have directed a verdict for defendant, as requested at the close of the plaintiff's case, and again at the close of the whole case.

II.

There is no evidence to support the judgment rendered in favor of plaintiff.

III.

There is no evidence tending to show that there was any excess in the Safety Fund, and it was error to permit the jury to find that there was an excess in such fund.

IV.

There is no evidence tending to show that there was any excess in the Mortuary Fund, and it was error to permit the jury to find that there was an excess in such fund.

V.

There is no evidence tending to show what was Dr. Johnson's share of the assumed excess in the Safety Fund and Mortuary Fund, and it was error to permit the jury to find that his share of this supposed excess "was sufficient to pay the amount of the premium due" by Dr. Johnson.

Dresser v. Hartford Life (See copy of opinion in appendix to this brief);
Dresser v. Hartford Life, 80 Conn. 681; 70 Atl. 39;
Crossman v. Mass. Ben., 9 N. E. 753;
247 McGowan v. Sup. Council, 76 Hun. 534;
Smith v. Cor. Mut., 16 Tex. Civ. Ap. 593;
Rosenberger v. Washington Co., 87 Pa. St. 207;
White v. Ins. Co., 93 Mo. Ap. 282;
Newcomb v. Jones, 37 Mo. Ap. 475;
2d Wigmore Ev., p. 1228, Sec. 1058;
Sands v. Boutwell, 26 N. Y. 233;
White v. Ross, 4 Ab. Ap. 589;
White v. Coventry, 29 Barb. 305.

VI.

Instruction No. 1 is erroneous, conflicting and misleading in that it authorizes the jury to find that "there was a sum of money in excess of $1,000,000 in the Safety Fund * * * and a surplus in the Mortuary Fund" and that "Dr. Johnson's share in such excess, if any, was sufficient to pay the amount of the premium due" (Rec., p. 214).

VII.

Instruction No. 2 is erroneous in that it put upon the defendant the burden of showing that it was "necessary" for defendant to levy Call 95, and to show that such call or assessment "was made by the

directors of the defendant' and to show that said call "was not for a larger amount than was necessary to pay the death losses which had accrued up to that time" and that such call was not for a larger amount than was necessary "after giving Dr. Johnson credit for his pro rata share of the excess in the Safety Fund and Mortuary Fund, if any," and because there is no evidence from which the jury could find that the assessment was for a larger amount than was necessary and no evidence from which they could find what was Dr. Johnson's share of the supposed excess in either the Safety Fund or Mortuary Fund (Rec., p. 215).

248 VIII.

Instruction No. 3 is erroneous in that it permits the jury to find (first) that there was on hand in the Safety Fund a sum in excess of $1,000,000, (*a*) because there is no evidence upon which to submit this question to the jury and (*b*) the amount named in the instruction is not limited to $1,000,000 "par value," which is the privilege and requirement of the trust agreement. Second, this instruction is also erroneous in that (*a*) it makes the defendant liable if the jury shall find that "there was in the hands of the defendant a Mortuary Fund which had been collected from previous assessments," because necessarily such fund was, in the main, the result of previous assessments, and the creation and maintenance of such Mortuary Fund was the defendant's duty under the contract, and (*b*) said instruction makes it the duty of the defendant to entirely use up said Mortuary Fund before it could lawfully levy the assessment or call in question. Said instruction is also erroneous in that it submits no facts for the jury to find, but merely generalities or conclusions. (Rec., p. 215.)

Fee v. National Association, 110 Iowa 271, 275;
Assn. v. Birnbaum, 116 Pa. St. 565;
Niblack Ben. So., Sec. 280;
Miles v. Mut. Res., 108 Wis. 421;
Mee v. Assn., 69 Minn. 210, 212;
Van Frank v. Assn., 158 Ill. 560, 565;
Cooley's Briefs, Ins., Vol. 2, p. 1027;
Felver v. R. R., 216 Mo. 195;
Ascher v. Shaeper, 25 Mo. Ap. 1;
Gerrans v. Wenger Mfg. Co., 51 Mo. Ap. 618;
Glick v. R. R. Co., 57 Mo. Ap. 97;
Bates v. R. R., 98 Mo. Ap. 330;
Furber v. Bolt Co., 185 Mo. 302;
Stokes v. Burns, 132 Mo. 214;
249 Holland v. Vinson, 124 Mo. Ap. 417;
Kennedy v. R. R., 128 Mo. Ap. 299;
Turner v. Snyder, 139 Mo. Ap. 656.

IX.

The amount of the Safety Fund or Mortuary Fund is no factor in determining the validity of Call 95.

X.

The insured had acquiesced in the forfeiture, and his acts amount to an abandonment of the contract sued on.

Ryan v. Assn., 96 Fed. 796;
Mutual Life v. Phinney, 178 U. S. 327;
Mutual Life v. Sears, 178 U. S. 345;
Mutual Life v. Hill, 178 U. S. 347;
Mutual Life v. Allen, 178 U. S. 351;
Jones v. Ins. Co., 28 Ins. L. J. 834;
Haydel v. Assn., 98 Fed. 200;
Lavin v. A. O. U. W., 112 Mo. Ap. 1;
Glardon v. Sup. Lodge, 50 Mo. Ap. 45.

XI.

Upon the entire record the judgment should have been in favor of the defendant and the judgment rendered should be reversed without remanding.

Stokes v. Burns, 132 Mo. 214;
Bates v. R. R., 98 Mo. Ap. 330.

250 *Argument.*

Safety Fund.

The statement preceding this argument will demonstrate, we think, that the Safety Fund in the men's Department did not exceed $1,000,000, par value, when Call 95 was levied. It is therefore impossible that there should have been any excess in that fund, and if there was no excess in this fund, or, to be more accurate, if there is no evidence from which the jury could properly find there was an excess, then it was error to permit the jury to find that there was an excess.

Our opponents will doubtless appeal to the statements found in the annual reports to the Insurance Department and endeavor to have your Honors draw therefrom the same conclusions that were announced in the King case, 133 Mo. App. 612.

The record in this case differs from the record in the King case in that it is here shown by undisputed and indisputable evidence that what is designated in the several annual reports to the Insurance Department as "Safety Funds" constitutes, in fact, two funds—one the men's and the other the women's—each credited, established and maintained by and pursuant to separate and distinct trustees' contracts, made at different dates, conditioned on wholly different terms and having wholly distinct and different beneficiaries, and carried by the company and the trustee entirely separate and distinct.

The opinion in the King case proceeds upon an entire misconception of facts—not, perhaps, a misconception of facts as

251 shown by the record in the King case, but a misconception of facts as those facts really are. And it has been the purpose in preparing and bringing this record before the Court to demonstrate that misconception—to bring here the record in this case in such shape that no one can misunderstand the true situation.

We desire, therefore, to analyze the statements and conclusions of fact and the deductions drawn therefrom in the King case, not for the purpose of retrying the King case, for we appreciate, of course, that that cannot be done, but to demonstrate, as we think we can, that the trial Court in this case erred in assuming (and erred in permitting the jury to assume) on the record now before the Court the same facts which the Court assumed as proven in the King case.

So far as the plaintiff's evidence is concerned, the proof in this case is substantially the same as the proof offered by plaintiff in the King case, but so far as the defendant's evidence is concerned the proof is entirely different.

The assumption of facts in the opinion in the King case may have been entirely justified by the record in that case and yet the same assumption might be, and is, entirely unwarranted in this case.

The King case, while res judicata as between King and the company, is not res judicata as between this plaintiff and the company, and certainly, if a different state of facts is shown by this record, the judgment of the Court in this case ought not to proceed on the assumption of facts induiged in the King case (even though these assumptions were justified by the record in that case).

The King case is somewhat extensively discussed in this
252 brief, because the plaintiff's evidence in this case, being so like the evidence in the King case, it is entirely probable (and we have assumed) that like contentions will be made on behalf of the plaintiff in this case, and our effort is to show that the evidence of the defendant in this case absolutely destroys the assumptions indulged in the King case; and, because your Honors are probably going to be asked to indulge the same assumptions in this case that were indulged in the King case, we purpose to take up the several statements of fact in the opinion rendered in the King case and show why those are not the facts that are in the record in this case.

The first reason assigned by this Court (in the King case) for holding the assessment invalid (and doubtless the same reason will be urged here), is (quoting from the opinion in the King case, 133 Mo. App. 622):

"At the time of the filing of the first statement in evidence (Report of 1900), the Safety Fund in the custody of the trustee had reached its contractual limit of $1,000,000 and had accumulated net earnings of over $112,000, which had not been, but should have been, paid over to the defendant for distribution among the certificate holders. This excess must have represented the earnings of the fund for at least two years or over, since the contract provided that when the fund should reach $1,000,000 the Safety Fund fees paid in by new members should not be turned over to the trustee, and the fund being invested in bonds of the United States had its earnings confined to the law rate of interest paid on such securities."

Taking up the 1901 report, the Court says in the King case (p. 623):

"During the year 1901 this excess increased from $112,569.14 to $166,905.02—a difference of $54,335.88—obviously the full amount of the increment for that year."

253 Assuming the correctness of the facts stated in the foregoing excerpts, the Court deduces a further fact which it states as follows (p. 623):

"It is perfectly apparent that for at least three years before the levy of the ninety-first assessment, defendant had received from the trustee no payment from the earnings of the fund, though the contract called for semi-annual payments of the excess over $1,000,000."

(*a*) The basic assumption indulged in the foregoing quotation is that there was only one Safety Fund, whereas the proof here is that there were two Safety Funds—there was the Safety Fund for the men's division and the Safety Fund for the women's division.

The amounts in the Safety Funds in the two departments at the end of 1900 and 1901 were as follows (Rec., p. 205):

1900.

Men's division, principal account	$1,041,285.29
Women's division, principal account	120,234.13
Men's division, income account	30,820.96
Women's division, income account	2,188.76
	$1,194,529.14

The aggregate of these items ($1,194,529.14) is the exact sum reported as one item in the third page of the report (Rec., p. 22) and is the same sum reduced by $81,960 ("Depreciation in ledger assets to bring same to market values"—see Rec., p. 23) found in the report (p. 23) "Net Safety Funds in Security Company $1,112,569.14, and of this sum your Honors (in the King case) assumed $112,000 (using round figures instead of $112,569.14) as the earnings
254 on one fund, when it is in fact (mathematically demonstrated) an undivided part of both funds which have been arbitrarily reduced to the then market value of both funds.

The figure, $111,495.36, described as "Mortuary Fund held in addition to reserve" in report of 1900 (Rec., p. 28) is made up of balance in Mortuary Fund, men's division, $89,461.38, and balance in Mortuary Fund, women's division, $21,903.20 (Rec., p. 144). These figures will be discussed later.

The figure, $230,220, described as "reserve on Safety Fund Policies" in report of 1900 (Rec., p. 28), is the accumulation on stipulated premium policies (Rec., pp. 127, 205). These figures will be discussed later.

The Safety Funds at the end of 1901 were as follows:

1901.	
Men's division, principal account	$1,053,394.04
Women's division, principal account	124,765.16
Men's division, income account	23,055.11
	$1,201,254.31
Less women's division, income account overdrawn.	140.81
	$1,201,113.50

The aggregate of these items ($1,201,113.50) is manifestly the same sum reported as one item, on the third page of the 1901 report (Rec., p. 29) as $1,201,236 [though there is manifest discrepancy (excess) of $162.50, which may be easily accounted for because we are comparing the figures of the Trust Company, the trustee, with the figures of the Insurance Company as found on their books and in their reports to the department, and it may well be that
255 the Trust Company on the last day of the year had received
this or some like sum which had not been reported to the Insurance Company on the day it was received or in time to be included in the report to the department]. This figure, $1,201,236, was reduced in the 1901 report by $34,330.98 ("Depreciation in ledger assets to bring same to market value"—see Rec., p. 29), leaving the same item on the next page "net Safety Funds in Security Company $1,166,905.02, and this is the same figure your Honors assumed in the foregoing excerpt as the principal plus the earnings of the one fund in 1901, when, in fact, it is the aggregate (principal and income) of two distinct funds.

That there were two funds in fact is established beyond dispute. The officers and records of the Insurance Company so testify, as do the officers and records of the Security Company, the trustee (Rec., p. 150), and the one fund, that of the men's division, has been judicially administered separate and distinct from the fund of the women's division. (See appendix, Dresser opinion.)

That every dollar received by the company for the Safety Fund was paid over to the trustee of the fund is established by the tabulation found in the record at page 121, verified by official examination (Rec., p. 121), and that the income from the Safety Fund was regularly paid to the Insurance Company by the trustee and was not permitted to accumulate either in the coffers of the trustee or of the Insurance Company, but was regularly credited to members and applied each and every six months in reduction of their assessments is established by the tabulation found in the record at page 123 (see Rec., pp. 147, 204), from which it appears that up to 1908
256 this fund earned and there was paid by the trustee to the In-
surance Company $1,037,195.58, and the Insurance Company has paid all of this sum to the members by way of dividends, save only a balance of $18,960.57, which was to be applied on the next mortuary call. At the end of 1901, four months before Call 95 was issued, the

balance on hand was $1,521.75 (Rec., p. 123), and there was credited to him on March 1, 1902, a dividend of $2.85 (Rec., p. 124); and that Dr. Johnson received his share of these distributions is shown by the tabulation found in the record at page 124, from which it appears that for the $50 which Dr. Johnson contributed to this fund he received back by way of dividends $52.75.

These are the facts established by uncontroverted evidence, and we submit that the Court cannot on this record indulge the assumption that the Safety Funds on hand in 1900 and 1901 was one fund, or that that fund was $1,000,000 principal and $112,000 increment in 1900, or $1,000,000 principal and $166,905.02 increment in 1901, but should find and hold on this record that there were two Safety Funds, one for the men's division and one for the women's division, and that the Safety Fund, men's division, was of the par value of $1,000,000 in 1900, 1901 and 1902, and the Safety Fund, women's division, was of the par value of $116,670.70 (December 31, 1900), $119,035.72 (December 31, 1901,) and $120,401.64 (December 31, 1902). (See Rec., pp. 205 and 206.)

We also submit that the Court should find and hold (because there is no evidence to controvert the indisputable evidence offered by the defendant) that the par value of the Safety Fund in the
257 men's division was only $1,000,000 on May 1, 1902, when call 95 was levied and that, therefore, there was no excess in the Safety Fund (see Rec., p. 205).

It is perfectly manifest that at no time was the Safety Fund in the men's division in excess of the contract limit, and that the assumption that it did exceed the $1,000,000 contract limit at any time, an assumption indulged by the trial Court (or which the trial Court permitted the jury to indulge), and the like assumption indulged by plaintiff's counsel in this case, is without foundation, and is a misconception due, perhaps, to the fact that in the reports to the Insurance Department of Missouri, the aggregate of both Safety Funds (men's and women's) is given without specifying that this is the aggregate of two separate and distinct funds, each provided for by separate and distinct contracts between the Insurance Company and the Trust Company as trustee, but each contract made upon different terms and for a separate and distinct set of beneficiaries.

In the King case there was nothing to disclose that the references to the Safety Fund and the Mortuary Funds found in the reports to the Insurance Department in fact related to two separate funds. Hence the inference was probably warranted on that record that there was only one fund, i. e., the fund referred to in King's policy. Here, however, the proof is undisputed that there were two separate funds, created by two distinct contracts, each providing for separate and different beneficiaries, and a like assumption would be wholly unwarranted.

It must be remembered that these reports and the statements in them are only evidence as admissions against interest, and as
258 such they may be explained or contradicted.

Wild v. Assn., 60 Mo. Ap. 200.

Here the explanation of the reports and the contradiction of the inference is found in the record. This was absent in the King case. These reports are by no means conclusive, as plaintiff will doubtless contend, but may be explained and mistakes shown.

White v. Merchants' Ins. Co., 93 Mo. Ap. 282;
Newcomb v. Jones, 37 Mo. Ap. 475.

In 2 Wigmore on Evidence, p. 1228 (Sec. 1058), it is said: "It follows that an opponent whose admissions have been offered against him may offer any evidence which serves as an explanation for his former assertion of what he now denies to be the fact. This may involve the showing of a mistake or the evidencing of circumstances which suggest a different significance to the words."

We have thus far dealt only with the fact that there were two separate and distinct Safety Funds and this fact must, we think, be conceded in the disposition of this case.

But our opponents will, doubtless, urge here, as was urged in the King case, that there was illegality in the division of the Safety Funds.

It will be found on examination that this contention also rests upon a misconception of the facts. In the opinion in the King case this Court said, aliunde:

"Neither the contract of the defendant with its certificate holders, nor that with the trustee, authorized or even mentioned such divisions" (i. e., men's division and women's division).

"Defendant could not create divisions and classes, not authorized by the contract."

259 This, as a general statement of law, need not be disputed, but it has, and can have, no application to the facts as developed by this record.

As shown above, the Safety Fund Department of the company (i. e., its practice to issue Safety Fund assessment contracts) originated in 1880 (Rec., p. 87). The basic instrument of that department was the trustee's contract of December 31, 1879 (Rec., p. 82). Thereafter, all policies issued in that department for a period of nine years were issued only to men, and they and their associates were the only beneficiaries of that contract.

In the year 1882 the company concluded to insure women on a like plan and the women's department or division of its members was established. A separate and independent trustee's contract was entered into with the Trust Company (Rec., p. 138), and thereafter all the female risks assumed by the company became the beneficiaries of this new trustee's contract. The men subsequently insured continued to come in under and participate in the benefits of the first (or men's) trust agreement of 1879, and all the women who were insured participated in the benefits of the second (or women's) trust agreement of 1882 (Rec., pp. 127, 137, 193).

To the women members an entirely different certificate was issued from that issued to the men and the men's and women's divisions were and have always been as separate and distinct as if they were in two separate companies (Rec., pp. 127, 137, 193).

It is therefore an entire misconception to say that there was any "division" of the Safety Funds. They were never combined. They were two separate and distinct funds from the beginning.
260 While it is true that this misconception is based upon the unfortunate combination or aggregation of the totals of these funds, in the formal reports made by the Secretary to the Insurance Department, as required by the Connecticut and other State departments (Rec., pp. 127, 128, 137), we submit that the Court can not justify a finding of the fact that there was a division of one fund into two parts when the indisputable proof is that there were always two funds.

We submit also that there is not the slightest illegality in the creation and maintenance of the men's division or department and the subsequent establishment and maintenance of the women's division.

The hazard of death among women, particularly married women, is notably different and greater at given ages than the hazard of death among men of the same age. This is especially true between the ages of 20 and 50, and there is, therefore, a natural reason why there should be separate and distinct departments where (as in this company at the time this policy was issued) the business was conducted entirely on the mutual assessment plan, by which the cost of the insurance was determined from year to year and from quarter to quarter by the actual death rate among the members or policy holders.

The charter of the company is broad and empowers the company to write and issue any kind of life insurance. The exact charter provisions is:

"Said corporation * * * may make insurance on the lives of persons, and may make contracts upon any and all conditions appertaining to or connected with life risks" (Rec., p. 73).

"It shall be the duty of the company to reserve out of its
261 receipts an amount sufficient to reinsure all outstanding risks other than mere accident risks and other than such contracts as it has made or may make wherein the sum payable upon the death of the person named in any such contract is made contingent upon an assessment collected from the associated holders of such contracts."

There is here no limitation upon the inherent power of the company to originally create classes among its members as they become such (not subdivide classes already established); to keep separate as one class or division its female risks and in another class or division, male risks; to create and maintain the men's division separate from the women's division. The right so to do inhered in the company under the powers granted by its charter, and we need not look for this power in either its contract with certificate holders or in the trustee's contract or contracts.

Reference to the opinion in the Dresser case (a copy of which will be found in the appendix hereto), will show that in administering this fund the courts of Connecticut have recognized the right of the company to have and maintain the two departments, the men's divi-

sion and the women's division, and have entered judgments and decrees which deal solely with the Safety Fund of the men's division. See pages 13, et seq., of the Dresser opinion.

Moreover, in a purely mutual company, where the source of authority is the constitution and by-laws, with whatever limitations they contain, the company may, when not prohibited by statute, divide its membership into classes.

In Sands v. Boutwell, 26 N. Y. 233, it is held: "A mu-
262 tual insurance company, organized under the general law
(ch. 308 of 1849), may divide its business and risks into distinct departments, or classes, pledging the premiums received in each department as the primary fund for the payment of losses in that department."

In White v. Ross, 4 Abbott appeal decision 589, it is held that "A mutual insurance company, formed under the general act of 1849, L. 1849, p. 441, ch. 308, may, under the power to determine the mode and manner of exercising its powers, divide risks into classes according to hazard, so that a note shall in the first instance be assessed only for losses of the class to which it belongs."

In White v. Coventry, 29 Barb. 305, it is held that the provision of a charter of a mutual insurance company under the act of April 10, 1849, relative to the incorporation of insurance companies, that the corporation might divide applications for insurance into two or more classes, according to the degree of hazard, and that the premium notes should not in such case be assessed for any losses, except in the class to which they should belong, does not conflict with any provision in the act under which it was formed.

If the power to divide the membership into classes exists in a purely mutual company, where each member is, so to speak, a partner with and a coinsurer of every other member, certainly the defendant company was authorized to divide its members into classes, because here the member's only rights are derived from his policy or certificate. He is not in fact a member of the company, but is
only a member of the class or division to which his policy
263 or certificate belongs and to which it refers. He has the right
to have all in his class assessed when he is assessed, because his contract contemplates this. But there is nothing in his contract which precludes the company from securing other members and creating another and different class with such other members. The hazard of their death may be less or greater (as in the case of female risks), and the creation of this separate and distinct class, taking nothing from and adding nothing to his rights or obligations, cannot concern him. The company's right to do this depends upon its charter powers solely and need not be sought for in the plaintiff's contract.

Moreover, the policy held by Dr. Johnson in the very opening clause provides for the levy of assessments or mortality calls "upon all members of the department wherein this certificate was issued," thus by necessary implication contemplating and assuming that there were other departments or divisions of members and, if this was within the contemplation or assumption of the parties, what

more reasonable ground could exist than the establishment of a division or department of female risks (the hazard among which is greater) separate and apart from the male risks.

Our opponents will, doubtless, urge that the statement in the reports to the Insurance Department that there was a balance in the "Safety Fund" or "Safety Funds" of a given amount is some evidence to support their contention that there was an "excess" or a "surplus" in this fund.

The "scintilla doctrine" has long since been abolished in this State, but, beyond this, the statement (even if on its face it can be construed as an admission that there was an excess in the par-
264 ticular fund in which Dr. Johnson was entitled to participate) is after all but an admission by the defendant's agent; the admission, if it is such, is fully explained; the explanation is reasonable; that one may, in an extensive report such as we have here, inadvertently occasionally use the word "fund" instead of "funds," or that this was a mistake or inadvertence on the part of the copyist, or the printer, is the natural explanation, and the explanation of the discrepancy (if it is a discrepancy) which comes from the reports themselves which refer to this same item variously as "Safety Fund" and "Safety Funds," but above all it is the facts, the truth, that courts of justice are maintained to ascertain and effectuate, their purpose is not to perpetuate error, and we submit that the sworn proof of the officers of the Trust Company and of the Insurance Company, the production of the records of both companies, all in the presence of plaintiff's counsel, given during an examination covering a week's time at the home office of the company, where they extensively cross-examined the witnesses and where they were afforded every opportunity to examine the records of the Insurance Company and of the trustee, the Security Company (Rec., pp. 151, 210), ought to prevail over the clearly erroneous contrary assumption based on the supposed technical inaccuracy (i. e., the use of the word "fund" instead of "funds"), found in one of the seven reports made to the Insurance Department, and that the finding of a jury based wholly upon such supposed technical inaccuracy, when opposed to the uncontroverted and incontrovertible proof of the facts—when so clearly opposed to the truth—should be set aside as founded upon no substantial evidence.

265 An admission unexplained may be some evidence.

An admission satisfactorily explained ceases to be evidence.

An admission satisfactorily explained and the explanation supplemented by incontrovertible evidence should always be held to be utterly worthless as proof of a fact contrary to the conceded truth.

Payments from Trustee of the Safety Fund.

It may also be contended, as was contended and held in the King case:

"That for at least three years before the levy of the ninety-first assessment defendant had received from the trustee no payment from

the earnings of the fund, though the contract called for semi-annual payments of the excess over $1,000,000."

But this contention must fail on this record, because the proof is indisputable that these payments were regularly made.

The officers of the defendant company and of the Security Company testified that the income from this fund had been regularly paid over by trustee and that these included the payments to that fund after it reached $1,000,000, as well as the earnings of that fund (Rec., pp. 146, 147) and submitted statements showing the collections, year by year (Rec., pp. 123, 150), verified officially by the Insurance Department of Connecticut (Rec., p. 122).

The records of the Security Company, the trustee, established the same facts (Rec., pp. 204, 205, 209).

266 The evidence offered was certainly the best evidence obtainable and there is nothing in the record to controvert it.

It is therefore clear that the contention that the income from the Safety Fund was not regularly and faithfully collected by the insurance Company and applied by it towards the payment of the members' assessments semi-annually is a misconception of the real facts.

That Dr. Johnson regularly received his share of these distributions is also incontrovertibly established (Rec., p. 124).

The Mortuary Fund.

The Court submitted to the jury the question whether there was a "surplus in the Mortuary Fund" (Inst. 1, Rec., p. 214) and put upon the defendant the burden of showing that Cail 95 was not larger than was "necessary" after giving Dr. Johnson "credit for his pro rata share of such excess" (Inst. 2, Rec., p. 215), and in effect told the jury that Call 95 was illegal if "there was in the hands of the defendant a Mortuary Fund which had been collected from previous assessments (Inst. 3, Rec., p. 215).

It will, doubtless, be urged here, as it was urged and held in the King case, that "the defendant was piling up a reserve on Safety Fund Policies, and what was but another name for the same thing, a "Mortuary Fund" (Opinion King Case, p. 623).

It is not our purpose to discuss the record facts upon which the Court announced this conclusion in the King case. The record in that case may have justified this conclusion there, but we insist that there is no justification for a like conclusion here. As pointed out by the Court in the King case (p. 624), "The sworn state-
267 ments there stood unanswered by any evidence", which is not the situation here. For we have now the positive and uncontradicted proof from every available source, amounting to a mathematical demonstration, that there was no piling up of either a Mortuary Fund or a Reserve Fund.

The Johnson certificate (Rec., p. 77) contemplates a Mortuary Fund and expressly provides that the assessments are to be levied to form a "Mortuary Fund". In the nature of things when these assessments are collected they must from day to day be placed in some

fund, and consequently, the assessments levied to pay death losses were deposited, as collected, in the Mortuary Fund, a fund maintained solely for the settlement of death losses. From this fund death losses were paid from day to day and what was left, after deducting therefrom what had been paid for death losses, represents the "balance in the Mortuary Fund" (Rec., p. 116).

When the tabulation of Call 95 was begun (April 1, 1902, the call being actually issued, however, thirty days later, May 2, 1902, and payable to the company on or before June 2, 1902), the condition of the Mortuary Fund and the death losses on hand were as follows:

Balance in Mortuary Fund	$179,710.78
Call 95 levied for	362,500.00
	$542,210.78
Outstanding death losses	465,921.00
	$75,289.78

There is no dispute that these "outstanding death losses" were losses by deaths which had actually occurred; the members
268 were in law—in equity—and in good conscience liable to assessment for every dollar of this liability—and the assessment was in fact made to provide for these actually incurred and existing death losses and nothing more.

On the assumption that Call 95 would be fully and promptly paid and the death losses liquidated from the proceeds of Call 95 and the balance in the Mortuary Fund, this possible excess of $75,289.78 would constitute the balance of the Mortuary Fund until the next quarterly assessment, to be levied August 1, the substantial returns from which would not begin to come in until September 1 (Rec., p. 141), a period of five months, and the death losses averaged $100,000.

This, of course, is on the theory that the assessment, the tabulation of which began April 1, 1902, was actually levied as of that date. As a matter of fact, however, the assessment could not be prepared for levy as of that date, as the clerical work in making up an assessment requires thirty days, and was actually levied May 2, 1902. On this date, May 2, 1902, the balance in the Mortuary Fund was $47,462.17 (Rec., p. 117). There were then outstanding and unpaid death claims aggregating $444,601.05. Call 95 was for $362,500. This added to the balance on hand in the Mortuary Fund gives $409,962.17. So that the total Mortuary Fund on hand, plus the amount of the assessment actually levied under Call 95 was $34,638.88 less than the aggregate of accrued death losses of that date.

It can not, therefore, be contended on this record that the company was piling up the Mortuary Fund to an unnecessary extent, for that fund was no greater (indeed, was far less) than the then
269 present necessities of the company, and the Mortuary Fund added to the amount expected to be raised by the call or as-

sessment then made, did not exceed the amount of accrued death losses for which the company was required to provide. Thus it is demonstrated that the Mortuary Fund was not more than it should have been.

Aside from this, however, a correct analysis of the contract sued on and of the trustee's contract attached thereto will demonstrate, we think, that the condition of, or amount in, the Mortuary Fund is no factor in determining whether an assessment may or may not be levied. The right or power to levy an assessment must be determined by the terms of the contract between the insured and the company. If the contract provided that the insured should pay an assessment every time it rained in Hartford, this would determine when an assessment might be levied.

The contract provisions for assessment are as follows:

First. The consideration for the certificate was the payment of expense dues of \$3.00 per annum on each \$1,000 of indemnity and "the payment of all mortality calls proportioned to the said indemnity, levied against the herein named member to form a Mortuary Fund for the payment of all indemnity matured by deaths of members and to create a Safety Fund as hereinafter described, which mortality calls, to be levied upon all the members in the department wherein this certificate is issued, whose certificates are in force at the dates of such deaths, shall be according to the table of
270 graduated mortality ratios given hereon, and as further determined by their respective ages and the aggregate indemnity at the dates of such deaths, with due allowance for discontinuance of membership" (Rec., p. 77).

"The member agrees to pay * * * within thirty days from the day on which the notices bear date, all mortality calls determined as within set forth, the proceeds of which" (less certain enumerated charges) "shall form the Mortuary Fund" (Rec., p. 79).

"The quarter days for the payment of mortality calls shall be the 1st day of March, June, September and December, notices of which will be dated and mailed thirty days before such dates" (Rec., p. 80).

These are all the provisions of the contract which have any bearing on the question as to when, and under what conditions, an assessment may be levied.

The time when the assessment is to be levied is absolutely fixed by the contract—it must be levied quarterly. The gross amount of each assessment is not fixed, and in the nature of things could not be fixed in advance, nor does the contract limit the assessments to be levied to the aggregate of death losses already incurred. On the contrary, the purpose of the assessment being "to form a Mortuary Fund," this purpose would be defeated, and no Mortuary Fund could ever be formed, if the company could only levy assessments for death losses already incurred, which would have to be paid out of the proceeds of the levy as soon as collected.

The expressed purpose of the assessment was "to form a Mortuary Fund for the payment of indemnity matured by deaths, and

271 to create a Safety Fund," and that the existence and maintenance of such Mortality Fund was essentially a part of the entire scheme of this contract, and was of its very substance, is manifest from a consideration of those provisions of the contract with respect to the payment of the death indemnity and the ultimate utilization of the corpus of the Safety Fund.

Second. The contract provision for the payment of the indemnity is: "Ninety days from the receipt * * * of satisfactory proofs * * * of death * * * there shall be due and payable out of the aforesaid Mortuary Fund, and not otherwise, the indemnity of $5,000."

There is in this contract no direct, personal liability on the part of the company, but only the obligation to pay out of (or on condition that the sum is then in) the Mortuary Fund, and the Company is not liable otherwise.

So that the monetary value of this contract to the plaintiff depended upon the creation and maintenance of a Mortality Fund, from which his certificate, if he died in good standing, could be paid. Without a Mortuary Fund the practical value of the contract would be materially lessened.

If the existence of "an excess" in the Mortuary Fund debarred the Company from levying an assessment, there never could be any Mortuary Fund, because the Mortuary Fund is of necessity an excess—it is the fund collected from assessments from which death claims are to be paid.

Without such a fund on hand the Company could not be operated as a practical business concern. Let us assume that it had no
272 Mortuary Fund on April 1, when call 95 was tabulated. It then had on hand death claims aggregating $362,500, some of which were proved up early in January (the previous assessment having been made up January 1st). Call 95 did not go out until May 2nd. Payment of this call was not required until June 1st, and payment could be extended by the members until June 15th, and where the member resided in the far West payment could not be required until June 20. It is therefore apparent the Company could pay no substantial part of the January losses from the proceeds of call 95 until June or July, five or six months after they were proved up. Yet, by its contract, it was required to pay in ninety days. These are practical difficulties, true, but difficulties that were bound to arise out of the performance of the contract, if the Company did not have a Mortuary Fund. Therefore, the contract provides the creation and maintenance of a Mortuary Fund, yet the plaintiff's contention is that the existence of a Mortuary Fund debars the Company from levying an assessment.

These reasons for the maintenance of a Mortuary Fund are details at length in the testimony. (Rec., p. 190 et seq.)

In addition to these practical reasons for maintaining a Mortuary Fund, as the contract provides in its provisions with respect to the payment of the indemnity, there are the further provisions of the

contract with respect to the ultimate use of the corpus of the Safety Fund.

Third. The contract provisions for the use of the Safety Fund.

273 After providing for the payment of assessments for the purpose of forming a Mortuary Fund and the payment of the indemnity (when matured by death) from the Mortuary Fund, and not otherwise, the contract provides that if the Mortuary Fund shall fail to provide the indemnity contemplated, the Safety Fund shall be divided among the members—thus giving them in cash, while alive, their proportionate part of the Safety Fund in lieu of the indemnity promised from the Mortuary Fund.

The certificate says (after providing that the income from the Safety Fund shall be distributed semiannually among the members), "Said Company further agrees that if at any time it shall fail by reason of insufficiency of membership * * * to pay the maximum indemnity provided for by the terms of any certificate issued in said department * * * then it shall be the duty of said trustee to at once convert said Safety Fund into money and divide the same * * * among the holders of certificates then in force in said department" (Rec., p. 78), and such also is the provision of the trustee's contract. (Rec., p. 83.)

This certificate and the accompanying trustee's contract were before the Supreme Court of Connecticut for construction in the case of Dresser v. Hartford Life, 70 Atl. 39, 80 Conn. 681. The construction given to these contracts by the Supreme Court of the State, where the contracts were made, and where the fund is being administered, ought to be followed by the courts everywhere. Unless at least this is done, what hope have we for uniformity in the administration of the law? The Supreme Court of Connecticut, after setting out the foregoing provision of the certificate, and stat-

274 ing the several contentions of the parties, says this:

"Clearly, by the word 'fail' is not meant a default in any obligation assumed by the Insurance Company. While the Company undertakes to make the assessments (Lawler v. Murphy, 58 Conn. 295, 20 Atl. 457, 8 L. R. A. 113), and to pay the sum collected, its express agreement is to pay the amount of certificates from 'the Mortuary Fund, and not otherwise.' If, after an assessment for the payment of the amount due upon a certificate is properly made, and the assessment paid, the amount realized proves insufficient to pay the indemnity due, the failure is that of the Mortuary fund."

Therefore, it is the failure of the Mortuary Fund to provide the indemnity promised—a deficiency because of insufficiency of members—the failure to realize from assessments levied at the ratios fixed by the table and limited to the amount opposite age 65, that produces the contingency upon which the corpus of the Safety Fund may be distributed among the members.

Surely where the failure of a Mortuary Fund to accomplish a given purpose is a stipulated contingency, and where this contingency pro-

duces such important results, it can not be successfully urged that no Mortuary Fund can be maintained—not only is its existence, and its sufficiency, a material thing in the working out of this contract, but, by the terms of this contract, every assessment was to be levied for the purpose, in part at least, of creating and maintaining the Mortuary Fund.

And if it be conceded that the maintenance of some Mortuary Fund, or a Mortuary Fund in some amount was contemplated (and we think at least this much must be conceded), but it is con-
275 tended that the amount must not be unreasonable, we stand ready to grant the contention and appeal to the record to demonstrate the entire reasonableness in amount of the Mortuary Fund maintained by the defendant.

On May 2, 1902 (April 30), when call 95 was levied, the Mortuary balance was $47,462.17, as against $440,000 outstanding death losses (Rec., p. 117), and when that call became due, June 1, 1902, the Mortuary balance was $39,890.54, as against $386,000 of death losses. (Rec., p. 117.) It is true that these Mortuary balances were larger at other dates—as high at one date in 1902 as $179,710.78, but this was immediately after the due date of a particular assessment, when the Mortuary balance would necessarily be large, but these larger amounts are promptly reduced, and grow smaller month by month, until we reach the next due date of an assessment. With outstanding losses always ranging from $270,000 to $450,000, it can not be contended that a Mortuary Fund of half this amount was unreasonable, and at any event the condition May 2, 1902 (which, after all, is the really material date), with less than $50,000 of Mortality Fund on hand and unpaid losses accrued of $440,000, how can the Court or jury say that there was an "excess" or "surplus" in the Mortuary Fund, and will this Court, on this record, affirm and approve as a finding of fact the ipsi dixit of the jury that there was a "surplus" or "excess" in this fund? We believe not. What is an "excess" or a "surplus"? What did these terms mean in the instructions? The Court did not tell the jury. It is difficult to define what is an "excess" or "surplus" abstractly, and the question was submitted to the jury as the abstract proposition, without guide or compass, figures or data from which they could determine what was an "excess" or
276 "surplus." The Court might have considered one amount as an excess or surplus and the jury another.

Suppose that on May 2, 1902, when call 95 was levied, no assessment at all had been levied. And, if plaintiff is right in her contention, no assessment should have been levied. The Company then had in the Mortuary Fund $47,462.17. Its outstanding losses were $444,601.05. (Rec., p. 117.) It could have paid ten per cent of its losses and go into bankruptcy, and this is the logical result of plaintiff's contention. Certainly no such intention was in the minds of the parties when they made the contract, and that contract should not be construed to defeat, rather than accomplish their manifest purpose.

As applied to this case, and under the doctrine of the King case, if the fund did not exceed a "reasonable amount," it was not an excess, invalidating the assessment.

The question of the right of the Company to keep on hand a reasonable mortuary balance came squarely before the Superior Court of Connecticut in the case of Dresser and others v. Hartford Life Insurance Company and others (and a copy of the opinion of the Court will be found in the appendix hereto). The Court there says (see pp. 11 and 12 of the opinion):

"The plaintiffs claimed it was improper and wrongful to accumulate these margins and to carry this balance in said Mortuary Fund, and claimed that said balance of margins should be distributed among the outstanding certificate-holders, but it is held that it is proper and reasonable that the Company should hold some such fund for the purpose of enabling it to pay losses promptly, but it is
277 not necessary for that purpose that the Company should hold more than the amount of one average quarterly assessment for the previous year.

"Said fund belongs to the certificate-holders and is held in trust for them, and the Hartford Life Insurance Company has the right to hold the same, to the extent above stated, in trust for said certificate-holders and for application to the settlement of death claims, and said fund should be ultimately distributed in the settlement of death claims and as hereinafter provided."

It is true that this is not the opinion of the court of last resort in Connecticut, but it is the final and unappealed-from opinion and decree of a court of general jurisdiction of the State where this Company's charter was issued and where this fund is being administered, rendered after a prior appeal in the same case (see 80, Conn. 668), and of a court of equity which has jurisdiction over the defendant and of the funds in question here, and pursuant to whose orders the administration of the fund is conducted. The case was brought by a number of policy-holders, situated as the insured here was situated, on their own behalf as well as on behalf of others similarly situated, and the opinion has been acquiesced in by the plaintiffs and acted upon by the defendant company.

Perhaps it will be urged that this opinion and judgment is no more than persuasive authority. But, if it is only this, surely it ought to persuade. It would be little less than abominable if the Company was controlled as to the management of these funds by divergent views of numerous different courts, for then neither the Company, the insured, their lawyers nor the courts could ever possibly tell what were the Company's rights and duties with respect to these
278 funds. On principles of comity, this Court should incline to follow and adopt the rule there laid down. But we submit that the case is something more than merely persuasive authority. It is the opinion, judgment and decree of the Court in which this fund is actually being administered and by the decrees of which the defendant is bound, and the defendant being bound thereby, the rights of the beneficiaries of these funds ought not to be determined by a rule variant from that by which the Company is bound to administer the fund. The Mortuary Fund, which the defendant has maintained, it has been adjudged right and proper for it to maintain by the courts of Connecticut. This judgment is unappealed from and is final, it

has been acquiesced in and acted upon, yet the jury in this case have found, and the lower court permitted them to find that the Company had no right to maintain such fund and that its maintenance invalidated the assessment in question. We submit that common justice ought to induce the courts of Missouri to follow the judgment and decree of the Connecticut court.

There is, however, still another reason which justifies the maintenance of a reasonable Mortuary Fund—a fund in such an amount as is sufficient to meet the emergencies likely at any time to confront the defendant—the emergency of excessive death losses, panic, unusual lapsation, or numerous other causes that suggest themselves. That some such fund, in some amount, ought to be on hand, is not only plain as a matter of right reason, but the assessment laws of Missouri clearly contemplate the maintenance of such fund in an amount not less than the amount of one assessment. Our assessment law (Sec. 6954, formerly 7905), provides for the "ac-
279 cumulation of an Emergency Fund which shall not be less than the proceeds of one death assessment on all policy or certificate holders thereof" and further provides that if such fund, having been accumulated, shall be used, in whole or in part, the Company shall make up the deficiency within six months.

The Mass. St. (1880), Chapter 196, Section 3, providing that beneficiary associations, etc., "shall have the right to hold at any one time, as a Death Fund belonging to the beneficiaries of anticipated deceased members, an amount not exceeding one assessment" does not require that losses as they occur shall be paid from this fund, but the officers at their discretion may levy an assessment to pay such losses. Crossman v. Mass. Ben. Assoc., 9 N. E. 753.

"Moneys in the hands of the treasurer of a benefit society if already legally drawn on so as to reduce them to a less sum than the amount which fixes the limit of the right to make an assessment, are not 'in' the fund, so as to prohibit the calling of an assessment." Eaton v. Supreme Lodge, K. H., 8 Fed. Cas. No. 4,259*a*.

"The fact that a claim has been paid out of a fund on hand does not invalidate an assessment made to replenish such fund." McGowan v. Supreme Council, C. M. B. A., 76 Hun. (N. Y.) 534, 28 N. Y. Suppl. 177; Smith v. Covenant Mut. Ben. Assoc., 16 Tex. Civ. App. 593, 43 S. W. 8, 19.

When Call 95 was issued (May 2, 1902) the balance in the Mortuary Fund was $47,462.17 (Rec., p. 117). The estimated proceeds of one assessment was $362,500, and to replenish this Mortuary Fund (clearly the equivalent of the emergency fund contem-
280 plated by our law) and that death claims might be paid therefrom, the assessment was levied for this sum.

We therefore find that the judicial decisions of Connecticut, acquiesced in and followed alike by the Company and the contending policy-holders, the statutes of Missouri, and right reason and business instinct all combine to justify the maintenance of this Mortuary Fund as defendant maintained it, but because a jury of the good citizens of Henry County believed that "there was a surplus in the Mortuary Fund," the assessment levied is held invalid (see Inst.

No. 1, Rec., p. 214). More than this, the Court told the jury that if they found that "there was in the hands of the defendant a (i. e. any) Mortuary Fund which had been collected from previous assessments," then the Call in question was invalid. We submit that the Court was not justified in submitting to the jury the question whether the Mortuary Fund maintained by the Company was excessive.

Was $47,462.17 an excessive Mortality Fund when the then outstanding death losses were $144,601.05 and when the next assessment could not be sent out for thirty days and its payment enforced for sixty days? Clearly not, but the jury, under the instructions necessarily so found, because these figures are indisputable and are absolutely uncontradicted by anything in the record. This is the finding, and this the proof on which the finding rests, which this Court is asked to approve. If a Mortuary fund of about one-tenth of the outstanding unpaid death claims is an excessive fund, what amount, may we ask, will our opponents deem not to be excessive? Certainly the Company is entitled to be informed what amount of Mortuary Fund will not be deemed excessive, if it is claimed
281 that $47,462.17 is excessive.

The truth is that in an action against an insurance company in behalf of the widow any sum, $40,000, $4,000 or $400, will probably be deemed excessive, if the jury is given, as they were in this case, a roving commission, unlimited by chart or compass, uncontrolled by fact or figure, to find that any sum or any amount is an excessive sum.

Reserve on Safety Fund Policies.

The "Reserve on Safety Fund Policies" is not to be confused with the "Mortuary Fund," for the two funds are entirely distinct and separate.

The Mortuary Fund, as explained above, is the balance on hand from time to time of the assessments collected and not yet paid out on death claims.

Generally speaking, and as applied to the great bulk of Safety Fund policies, the assessments were levied after the deaths had accrued and to provide therefor. The assessments were not fixed or level and called for and carried no "reserve."

As to a small class of Safety Fund policies, however, a class originating and issued long after plaintiff's policy was issued and at premium or assessment rates largely in excess of the premium or assessment rates on which plaintiff's policy was issued, the rate of premium or assessment was fixed at a higher rate for a period of seven years, with a proviso that at the end of seven years these policies should become Safety Fund policies. During the first seven years of the existence of these policies they were not Safety Fund policies, paid their own death losses, and only became Safety Fund policies after seven years.

282 During the first seven years of these policies the Company was required to and did accumulate the premiums on these policies out of which it paid the death losses. The balance from year to year it was required to and did hold in reserve for the benefit of these policies. These policies were not Safety Fund policies, but were to become Safety Fund policies after seven years and after they had contributed $14 to the Safety Fund, as against $10 contributed to this fund by the earlier certificates.

It was an entire inaccuracy to describe the balances held in reserve for the use of these policies as "Reserve on Safety Fund Policies." But this inaccuracy of description, made by one of the officials of the Company, ought not to prevail against the truth, the real facts which are established by this record. This inaccuracy ought not to operate inevitably to charge the Company with having on hand to the credit of the class of certificates to which Dr. Johnson's certificate belonged a fund that he had nothing to do with, that did not belong to him, that did not ever belong to the Company, but belonged entirely to a different set of men.

Was the Assessment Excessive?

The real, substantial question in this case is whether the assessment itself was excessive.

In discussing this feature of the case, we purpose to assume (for the purposes of the discussion only, however) that if the assessment was excessive it was wrongfully levied and therefore no forfeiture of the insurance could be predicated upon its non-payment, and that whether it was exces-ive is to be determined by the Court and
283 jury in an action to recover on the policy.

But even if the question whether the assessment was excessive, and therefore void, may be thus determined, it must appear as pointed out by this Court in the King case (133 Mo. Ap. 620, l. c.), that "after making reasonable allowance for expenses and failure to make collections, the proceeds of the call would exceed materially the amount required to meet death claims" before a given assessment can be held to be excessive.

In Rosenberger v. Washington Co., 87 Pa. St. 207, 212, the Court says:

> "Assessments must be limited to the objects declared in the charter and by-laws. The managers may exercise a reasonable discretion in fixing the amount to be raised, for the charter must be construed in reference to its practical working. The actual sum required can be ascertained; but as expense must be incurred in the collection and loss be sustained in consequence of insolvency of members, proper allowances may be made for failures likely to result from these and other causes, and if the allowances are reasonable in amount and consistent with good faith on the part of the managers, they will not vitiate the assessment. But if these reasonable limits are disregarded and transcended, purposely or by culpable carelessness, the assessment is illegal and void. * * * By the terms of the

charter the plaintiffs submitted themselves to the acts of the managers as representatives of all the members. They were bound by the assessment unless they can show fraud or gross mistake. The presumption is that it was properly made (Hummel's Ap., 28 P. F. Smith 320). * * * Simple excess arising from error of judgment where the managers acted honestly and prudently would not vitiate the assessment. To neglect payment of a fair assessment vitiates the policy."

284 It is therefore important to consider,

First. What was the amount of death losses to be provided for?

Second. What was the gross amount for which the assessment was levied?

Third. After deducting from this gross amount the probable lapses what was the probable net amount that would be received from the assessment; and

Fourth. Did this probable net amount materially exceed the deaths for which provision should be made?

The contract provides for quarterly assessments and the uniform practice of the company was to levy assessments quarterly.

Naturally, therefore, each assessment should be for the amount of the then accumulated unpaid death losses.

The computation of the assessment and the apportionment thereof among 25,000 members, the preparation of as many individual notices, each for a different amount, and the mailing of these notices, consumed, as the testimony shows (p. 114), a period of about a month, and the assessment was not collectible (demandable) until from 30 to 50 days thereafter, the exact date depending, by the terms of the policy, on the place of residence of the member.

It would seem, therefore, that the Company should not be held to have made an excessive levy if the aggregate of any particular assessment was for the sum of five months' death losses or $500,000 (Rec., p. 115).

But the assessments were not levied on this theory. They were levied only for the actual deaths which had already accrued and which had not been previously assessed for.

The assessment against Johnson (call 95) was for an
285 aggregate of $362,500 death losses (the amount and date of each being found in the list accompanying the notice [Rec., p. 101]).

The net amount of the assessment after assuming a lapse ratio of 5 per cent was $362,631.34 (Rec., p. 112).

The excess of the amount levied over the amount necessary to collect for these losses alone was only $131.34. Can it be said that this was an amount so much in excess of what was necessary as justified the insured in assuming that the assessment was therefore void—such an excess as would justify him in the eyes of the law in lying by silently for five years, indulging this assumption (as well as the further assumption that your Honors would indulge the like assumption) and waiting for the grim reaper to carry him away and then let his beneficiary enforce these assumptions and collect his in-

surance from his brother members to whose death losses he had made no contribution for a period of five years?

It has been repeatedly held that slight errors do not invalidate an assessment.

1 May on Ins., Sec. 588 (4th Ed.);
2 Beach Private Corp., Sec. 592.

An assessment made in good faith, upon correct principles, and substantially correct, is binding, notwithstanding small errors, upon a member who is not affected to a perceptible amount by the error.

Marblehead Co. v. Underwood, 69 Mass (3 Gray) 210.

Mistakes (fraud being absent) do not vitiate an assessment.

Buckley v. Columbia Ins. Co., 92 Pa. St. 501;
286 Susquehanna Mut. Fire Ins. Co. v. Grackenbach and others, 115 Pa. St. 492;
People's Mut. Fire Ins. Co. v. Graff, 154 Pa. St. 290;
Maine Mut. Marine Ins. Co. v. Barker A. Neal, 50 Me. 301;
People's Mut. Ins. Co. v. Otis Allen, 76 Mass. 297;
Hyatt v. Esmond, 37 Barb. 601.

Probable loss, by failure of some of the members to pay the assessment, may be included in levying the assessment.

Jones v. Susin, 72 Mass. 288;
People's Mut. Equitable Fire Ins. Co., Petitioners, 91 Mass. (9 Allen) 288;
The New England Mut. Fire Ins. Co. v. Belknap, 63 Mass. (9 Cush.) 140.

We submit that if the Company was absolutely certain that its ratio of lapse would be only 5 per cent, this excess of $131.34 (which is only three one-thousandths part of one per cent of the entire assessment) ought not be held to be a sufficient excess to make void the entire assessment. If it was void as to Johnson, it was void as to every other member and, if Johnson was justified in refusing payment, every other member would have been justified in taking a like position, and, if every other member had taken a like position, the death knell of the association would have been sounded. This is but testing out to its logical conclusion the theory advanced for Doctor Johnson and applying it to all those similarly situated, and it seems to us to demonstrate that there must be something morally wrong in a theory which makes the penalty of a slight error the absolute destruction of a body of insurants who have maintained a co-operative form of insurance for a quarter of a century and
287 who, seemingly, desire to work out their plan of insurance to its ultimate conclusion. It is true the law abhors forfeitures, but we submit that the plaintiff's theory applied to all the members in like position with Dr. Johnson would result in the wholesale forfeiture of all of this insurance, and all for a mere mistake—a miscalculation of the number of members who would refuse to pay this assessment.

The Company, which was after all but the trustee or agent for all the members of the Safety Fund Division, and with no personal liability, if it honestly discharged its duties in collecting and disbursing the Mortuary Fund, could not know absolutely how many members would lapse. Under the law as stated in the King case, they were required to "make reasonable allowance for failure to make collections" and under the terms of Johnson's certificate they were required to make "due allowance for discontinuance of membership" (Rec., p. 77). What was a "reasonable allowance" was a matter of judgment. There is not an iota of evidence that the Company acted in bad faith in assuming a lapse of five per cent—this judgment was based in part upon past experience of their present opinion as to what might be expected on this call and their judgment was that they might expect a lapse among this membership equal to five per cent (Rec., pp. 167, 168).

And what was the actual lapse rate experienced on this call as compared with the lapse rate anticipated. The actual lapse was 3.52 per cent (Rec., p. 185). The anticipated lapse was 5 per cent. The difference between the actual and the assumed lapse rate was 1.48 per cent. Deducting 5 per cent, the assumed lapse, the
288 Company expected to collect $362,631.34. Deducting 3.52 per cent of the actual lapse, the Company actually collected $368,280.80. The difference is $5,549.46.

Is the entire assessment to be held void because the officers "missed their guess" by a little over one per cent when they could not possibly know whether a single member would pay or refuse to pay, when the most that they could do was surmise?

And what was to become of this excess, if there should prove to be an excess; and what actually became of the excess inasmuch as there proved to be an excess?

Not one dollar of it was to go to any officer or director of the Company and not a dollar of it reached the pockets of any of these. This excess went, as all assessments went, into the Mortuary Fund of the Company and was, with the other moneys therein, faithfully devoted to the payment of death losses (Rec., pp. 116, 186).

There cannot be in this case any reasonable contention of bad faith on the part of the officers or directors, because they could not and did not profit a single cent by the excess on this or any previous assessment. They could have no possible motive for acting in bad faith.

The aggregate accumulated death losses were $362,500. These had to be met. An assessment of one rate on all the members would have produced only about one-fourth of the amount necessary to pay these death losses. The Company could not control the extent of deaths among its members. It was therefore necessary (assuming that all members paid the assessment) to levy the call for three and six-tenths times the sum of one rate, but it was the invariable experience (as it must be always) that some members would refuse
289 to pay and others would die day by day and hour by hour, and that, therefore, some lapsation was bound to occur.

What the amount of this lapsation would be was beyond human

ken and in the nature of the case the extent of this lapse was to the last degree problematical. The judgment of any man or men on this question could, under the most favorable conditions, be nothing but an opinion or guess and this is the only point in the entire transaction where the Company was allowed any discretion and, under the law, and by the terms of the contract, the Company was required to exercise a discretion as to the probable lapsation that would occur on each assessment and to make due allowance therefor. They exercised their discretion; they allowed for a lapse of five per cent. This was less than had been assumed on many calls and more than had been assumed on others (Rec., p. 167). No one could say when the allowance was determined that this was a greater allowance than was necessary, and how then can any one say now that the Company abused their discretion and allowed for a greater lapsation than they were warranted in allowing; and how can it be urged that they acted in bad faith when the entire proceeds of the assessment went into the Mortuary Fund? The rate must have been 3.6 per cent or three and six-tenths the amount of one call, had there been no allowance for lapsation. With the allowance for lapsation the rate was 3.8 per cent or three and eight-tenths times one rate. So that Dr. Johnson's call was increased by this allowance two-tenths of one rate or 76 cents over what it would have been had there been no lapse at all.

The actual lapse was 3.52 per cent. The lapse assumed by the Company was 5 per cent.

290 The assumption of 5 per cent lapse produced a rate of 3.8 times one assessment.

If the Company had been able to foretell the exact lapse rate, i. e., 3.52 per cent, and had reduced the amount of one call ($100,451.90) by the ratio 3.52 per cent, instead of 5 per cent, the net amount of one call would have been $96,916, instead of $95,429.30 (which is $100,451.90 reduced by 5 per cent).

The figures $96,916 divided into $362,500 (the deaths assessed for) give a rate of 3.744 instead of 3.8.

If we use the rate 3.744 to muitiply Dr. Johnson's ratio 3.654 (the ratio specified in Dr. Johnson's policy) we get $13.68 as assessment for $1,000 indemnity, which multiplied by 5 (thousands of insurance) we get $68.40, whereas on a 5 per cent allowance he was actually assessed for mortality $69.40 (Rec., p. 113), a difference of exactly $1 or 20 cents per thousand of insurance. In other words, tested by the actual experience, the Company assessed Dr. Johnson $1 too much or a little more than one per cent of the assessment, and, because the Company could not foretell the future by one per cent, it is claimed the assessment was excessive.

The judgment in this case, on the entire Record, should have been in favor of defendant, and the judgment rendered, which was in favor of the plaintiff, should be reversed without remanding.

When, and under what circumstances, an assessment may be levied, must be determined by the contract. Neither the unwritten law, nor any statute, undertakes to say when an assessment may be

291 levied by an assessment association, company or society.

In fraternal beneficial associations and mutual assessment

companies we look not only to the certificate of membership and charter of the company, but as well to the "constitution" or "by-laws" which are a part of the contract, and it is because they are a part of the contract that these documents are considered in determining the power, and the limits upon the power, of assessment in mutual associations.

Where the contract is made by the member with a corporation which, as here, is merely acting as the agent or trustee of the members, and where the right to levy assessments, and the limitations upon that right are found solely in the certificate—where the certificate is the entire contract—resort must be had solely to the certificate, which is the sole evidence of the contract, for the ascertainment of this power and the limitations thereon (Niblack Ben. So., Sec. 280).

If we look to the certificate (Rec., p. 80, clause 5), we find that "the quarter days for payment of calls shall be the 1st day of March, June, September and December in each year, notices of which will be dated and mailed thirty days before such dates," i. e., February, May, August and November.

We therefore find that the time for levying these assessments is fixed by the contract; we also find that the ratio, or proportion of the entire amount levied which may be assessed against this member is likewise fixed by the table of ratios attached to the policy, and was, in this case, 2/3 of $5.48, or $3,654 (Rec., pp. 86, 112).

So that on the 2nd day of May the Company was required to levy an assessment for a definite and defined proportion of the
292 amount necessary for the payment of outstanding death losses.

Moreover, clause 5 of the certificate (Rec., p. 80) clearly obligates the member to make payment of assessments levied upon these dates; and the expressed purpose of the assessment is "to form a Mortuary Fund" for the purpose of paying death claims as well as to provide a Safety Fund, and not merely to pay the death claims already accrued.

True, the certificate contemplates that the amount of accrued death claims shall be a factor, and the prime factor, but not the sole factor in determining the gross amount to be levied for each call. True, also, that the Company, in its practice, made the amount of accrued death losses, the prime, but not the sole, factor in determining the gross amount of the levy.

But the "allowance for discontinuance of membership" was also a factor contemplated by the certificate and resorted to and utilized in the levy of assessment; and in the certificate, as in the practice, the extent of this allowance was left to the judgment of the Company.

So that we have in this contract as absolute elements fixed by the contract the time when the assessment shall be levied and the proportion of the gross amount of the assessment that shall be levied against this member, and we have the other elements, not absolutely fixed by the contract, but left to the judgment of the company, i. e., the gross amount of the assessment and the allowance for discontinuance of membership.

The judgment of the Company as to either of these elements, even if that judgment was erroneous, would not invalidate
293 the assessment, in the absence of bad faith.

In the King case the Court lays down this principle as applicable to assessment insurance:

"No presumption of right acting in the levy of assessments will be entertained, but on the contrary, defendant will be held to prove that the assessment is necessary, was not excessive, and was levied in the manner and for the purposes prescribed in the contract."

We submit, with all due respect, that this statement will be found inaccurate on careful analysis.

What is "right acting" depends upon the contract, for that is the source of the power to act at all.

It is only when the contract says that assessments shall be levied only "when necessary" that the Company is required to show that the "necessity" for the levy exists.

It is only when the assessment is for an amount greater than is required by the purposes for which the assessment is to be levied that the assessment can be said to be excessive.

Thus, if the right to levy the assessment is by the contract limited and restricted to the amount necessary to pay accrued death losses, this fixes the amount for which the levy may be made.

Among the authorities cited in the King case to support the foregoing quotation are the following:

Earney v. Modern Woodmen, 79 Mo. App. 385. There the contract (by-laws) obligated the member to pay "all assessments ordered by the Board of Directors" (p. 387). The Court very properly held, under this contract requirement, that "a material fact in the defense was that an assessment payable on the first day of
294 July, 1897, was levied or ordered by the Board of Directors;"
and finding that there was no proof of this material fact, properly affirmed the judgment.

Here there is no such requirement in the contract, and no omission on the part of the defendant to show compliance with every designated requisite of the contract.

Agnew v. A. O. U. W., 17 Mo. App. 254. There the Constitution of the Order provided that "each subordinate lodge shall make an assessment." The subordinate lodge did not undertake to levy the assessment—no lodge meeting had been held and it was impossible for the lodge as such to have ordered the assessment. Instead, the Grand Recorder undertook to levy the assessment. This he clearly had no authority to do and it was held that the assessment was illegal and void.

Hannum v. Waddill, 135 Mo. 153. There the question turned on the quantum of proof as to whether any assessment had been levied. The Court says:

"The by-laws required the corporation, on proof of the death of a member, to order an assessment upon the living members to pay the death losses. The members had the right to require this to be done before they could be called upon to pay the proportion of the benefits. The answer charged that an assessment had been made and the reply

put the allegation in issue. The burden was on the defendant to prove it. This proof doubtless could have been made by introducing the minutes or records of the corporation and this, in the absence of fraud, would probably be conclusive upon the member." (Karcher v. K. of H., 137 Mass. 371; Bauer v. Supreme Lodge, 13 Am. & Eng. Corp. Cases, 618 and note.)

Here this is just what was done. The original records were
295 produced; the witnesses examined concerning them in the presence of counsel; copies are attached to the deposition and the parties stipulated that these copies might be used with the same force and effect as the originals.

None of these cases support the proposition that it is always incumbent upon the company or association to show that the assessment was necessary. It is only when the power to levy assessments is restricted to such an amount as shall be necessary that the Company must show such necessity.

Here the Company was required to levy an assessment at a particular time. The purpose of the assessment was two-fold: first, to form a Mortuary Fund, and second, to form a Safety Fund.

Treating only of the first purpose, i. e., the formation of a Mortuary Fund—this, by express provision of the certificate required the Company to exercise their judgment as to the allowance that should be made for discontinuance of membership, and of necessity required the Company to exercise its judgment as to how large a Mortuary Fund should be maintained. This judgment involved a consideration of the losses already incurred, as well as those which might reasonably be expected until the next quarter day for assessment.

"If the allowances are reasonable in amount and consistent with good faith on the part of the managers they will not vitiate the assessment. * * * Simple excess arising from error of judgment where the managers acted honestly and prudently would not vitiate the assessment." Rosenberger v. Washington Co., 87 Pa. St. 207, 212.

296 The Court charged the jury that it was incumbent upon the defendant to show that the "assessment was made by the directors of the defendant" (Inst. 2, Rec., p. 215).

This is, perhaps, the law when the contract so requires, as in Earney v. Modern Woodmen of America, 79 Mo. App. 385, but it is not the law where the contract does not so require.

The member here agrees to pay the Company all mortuary calls as herein set forth. There is no requirement anywhere that formal action by the directors shall be necessary.

In Fee v. National Association, 110 Iowa 271, we find the precise point urged which the plaintiff here urges, and a case arising on a contract more nearly like the contract involved here than is the contract in any other case to which our attention has been directed.

The Court says (p. 275):

"It is asserted that as the assessment was made by the Executive Committee, appointed by the Board of Directors, it is illegal, in that such body cannot delegate this authority. By-law 17 empowered the Executive Committee to levy assessments. Article 4 of the articles

of incorporation provides for the election of nine directors, each holding for three years, to control its affairs, 'and who shall have power to enact such by-laws and rules as they may deem for the best interests of the association, and who shall appoint from their number an executive committee of three members, who shall have immediate supervision of the business of the association, and shall examine and audit all claims, bills, accounts and reports.' While Article 8 relates to assessments, none provide who shall make them. The
297 principal business of the association was to make assessments, and distribute them, when collected, to the parties entitled thereto. The immediate supervision of this business by an executive committee is expressly authorized and the power to enact by-laws for the best interests of the society given. We think, under this article, the Board of Directors was authorized to adopt by-law 17 under which the Executive Committee made the assessment. Garretson v. Association, 93 Ia. 402, relied on by appellant, is not in point. There the articles of incorporation required the assessment to be made by the Board of Directors and it was held that in such a case the president and secretary might not do so."

The power delegated by the board in the Fee case to the Executive Committee by formal by-law is precisely the same power delegated by the board in this case by the constant and unvarying practice of levying assessments by the act of the executive officers. The proof is that all assessments have been levied by the officers of the Company (Rec., pp. 101, 182).

A by-law or resolution of the Board of Directors may be passed informally, and may be inferred from circumstances, and may be shown by custom, usage and the method of doing business.

Waln v. Bank, 8 S. & R. (Pa.) 73;
Henry v. Jackson, 37 Vt. 431;
Lockwood v. Bank, 9 R. I. 308;
S. C., 11 Am. St. Rep. 253;
Atlantic Ins. Co. v. Sanders, 36 N. H. 252, 256.

In Conductors Association v. Birnbaum, 116 Pa. St. 565, it was the duty of the Board of Directors to order and levy the assessment. After notice of a given death the board ordered that when proofs of the death were received the secretary should make the assessment and send the notices. An assessment was so made. This
298 Birnbaum refused to pay and, notwithstanding his default, his widow (Birnbaum having shortly died) sued to recover the amount of his certificate. The lower court held that the assessment was illegal and directed a verdict for the claimant. The Supreme Court said:

"We think the Court below erred in instructing the jury that assessment No. 117 upon the death of Skinner was illegal. * * * It is conceded that if Birnbaum was in default his widow has no claim. That he did not pay assessment No. 117 is not disputed. It is said, however, that it was illegally assessed. That it was done in entire good faith can hardly be questioned. That it was done in

such manner as to save delay and give the deceased member's family their money as early as practicable seems equally clear. The mode of making the assessment was the usual mode; it was done by a mutual association of which Birnbaum was a member, and it was admittedly a just and proper assessment, one which the Company was bound in good faith to make."

There can be no question on this record that the assessment levied was necessary and proper and that it was levied in good faith and in the usual mode, just as in the Birnbaum case. The point made that it should have been levied by the Board of Directors is to the last degree technical and, if sustained, introduces into the contract, which only provided that the Company shall make the assessment, the further requirement and condition that the assessment shall be made by the Board of Directors of the Company.

Niblack on Ben. So., Sec. 280, says:

"It may be stated as a general proposition that when a society relies upon the failure of a member to pay an assessment as a forfeiture of his membership and the benefit thereof, it must show af-
299 firmatively that the assessment was made by the proper authority, for a proper purpose, in the manner indicated in the source from which it derives its power to make the assessment, and in accordance with the contract of insurance."

The "source of power" in this case was the contract. That contract authorizes the Company as such to levy the assessment and any officers, or officers' agent or agents, being officers or agents of the Company authorized, expressly or impliedly, so to do, could lawfully levy the assessment.

In Miles v. Mutual Reserve, 108 Wis. 428, the Court says:

"It is further claimed by respondent's counsel that the evidence fails to show the assessment was properly made, because there was no proof that the Executive Committee determined upon any sum as necessary to satisfy existing approved death claims, and it appears that the directors delegated or attempted to delegate their power to make the assessment to the Executive Committee. That assumes that the insurance contract required the directors to make the assessment and the Executive Committee to fix the precise amount necessary to satisfy the audited death claims. We do not so understand the provisions of the Constitution of the Association."

After quoting the Constitution, the Court says:

"That seems plainly to leave the whole subject of making assessments to the Executive Committee, except in case of an assessment made at a time other than one specifically mentioned. * * * The power of the committee was not limited to that of making such an assessment as was in fact necessary to satisfy audited death claims, but it was a broad discretionary power to levy an assessment for such sums as was necessary in their judgment to provide for the audited death claims. * * * It follows from what has been said
300 that the evidence conclusively shows that Call 97 * * * was made in all respects as provided in the insurance contract, that the assessment was not paid within the time limited therefor, and that the membership was thereby forfeited."

In Mee v. Bankers' Life Ass'n, 69 Minn. 210, 212, the Court says: "The first point made by plaintiff's counsel is that the so-called December assessment is invalid for two distinct reasons: (*a*) Because all steps looking towards the assessment were taken prior to the time specifically prescribed by the by-laws; (*b*) because no complete assessment was made by the Board of Trustees or by its resolution, what was relied on being largely the acts of the secretary or some clerk under his direction. We do not think it worth while to discuss this point at length. It stood admitted that ten death losses had actually occurred when on Nov. 6, 1893, an assessment being necessary and obligatory upon the association, the Board of Trustees, by resolution, made and levied the regular December assessment upon all members, to be collected according to the articles of association. From that time on until the last day of November, the secretary and one or more clerks were engaged in preparing, causing to be printed, and in getting ready for mailing the necessary notices of assessment or mortuary calls for over 12,000 members. These notices were dated December 1, and mailed on the last day of November. The articles provided that all assessments for the payment of death losses should be made by resolution of the Board of Trustees and a by-law had been adopted which read 'until and unless otherwise ordered by the Board of Trustees mortuary assessments' shall only be made on the first secular days of April, July and December in each year, and by special resolution. Although the resolution was adopted November 6, it was expressly made for the December assessment. It
301 was necessary for the resolution to be made and adopted prior
to the first secular day in December, long enough before, at least, to prepare the notices for mailing, and this is what was done. That the secretary and his clerks performed a large amount of clerical work incident upon the adoption of the resolution is of no consequence whatever. The articles and by-laws were substantially complied with and the assessment regularly and properly made."

In Van Frank v. Ass'n, 158 Ill. 560, 565, the Court says:

"It is next urged that the record fails to show an assessment was in fact made. The evidence shows a meeting was held at the office of the association on August 11, 1891, by the Board of Directors, when, on motion, the secretary of the association was instructed to levy an assessment September 1, 1891, on account of the death of the holders of eight certificates, and pay their beneficiaries. By Article 18 of the association members were assessed according to their ages, upon the death of a member of a division, and the action of the board sufficiently determined the assessment, as the articles provided the amount of the assessment, according to age, on each surviving member of that division. That action, in connection with the article, amounted to an assessment by the Board of Directors."

Cooley's Briefs on Ins. (Vol. 2, p. 1027) thus lays down the law on this subject:

"Delegation of power.—If the by-laws of a mutual benefit insurance society provide that assessments for death losses shall be levied by the Board of Directors, the board cannot delegate such power to the presi-

dent (Garretson v. Equitable Mut. Life & Endowment Ass'n, 93 Iowa 402, 61 N. W. 952). But where the articles of a company provided that the directors should control its affairs, and em-
302 powered them to enact by-laws and rules and to appoint from
their number an executive committee, who should supervise the business of the company and audit accounts and provide for assessments, but was silent as to who should make them, the directors had authority through a by-law, to empower the Exectuive Committee to make assessments. (Fee v. National Masonic Acc. Ass'n, 81 N. W. 483, 110 Iowa 271). So, where the constitution of a beneficial association provided that on certain fixed dates, or at such other dates as the Board of Directors might determine, an assessment should be made on the entire membership for such sums as the Executive Committee might deem sufficient, an assessment authorized by a resolution of the Board of Directors as to the date of making it, and by a resolution of the Executive Committee as to the amount and necessity, was not void because the directors had delegated their power to make the assessment to the Executive Committee. (Miles v. Mut. Reserve Fund Life Ass'n, 84 N. W. 159, 108 Wis. 421.) Where the by-laws of an association required all assessments to be made by the directors, and provided that the chairman should approve all proofs of death, and, on receipt of a claim for benefits on the death of a member, for which notice, but no proofs, had been received, the board directed the chairman to examine the proofs when received, and instructed the secretary, if the proofs were found correct, to issue notices of assessment, and the proofs were examined and the assessments made according to directions; the assessment is valid and binding (Passenger Conductors' Life Ins. Co. v. Birnbaum, 116 Pa. 565, 11 Atl. 378)."

In this case the certificate required the mortality calls to be levied upon all members in the department from which the certificate was issued, according to the table of graduated mortality rates given on the certificate. After $10 on each $1,000 of insurance has been applied to the Safety Fund, then the basis of all subsequent
303 mortality calls shall be 2/3 only of said table.

Here the method is pointed out in the contract and it is not specified who is to make the calculations. There is no provision that it is to be done by the directors. Such acts may be performed by any officer of the Company. It is not such business as is confined to directors. It is ministerial and may be done by the president or secretary. It could as well be contended that the net interest of the Safety Fund could not be paid by the Security Company to the defendant unless the Board of Directors of defendant took formal action to receive it. It seems to us such a contention would be absurd.

Dr. Johnson received his part of the Safety Fund year by year for thirteen years. This apportionment was made by the executive officers just as the assessments which he paid for thirteen years were levied by the executive officers. It is only fair to indulge the assumption that he know how these dividends were apportioned and the assessments were levied, particularly as he survived the forfeiture of

this policy for five years and never complained of this technical failure of the directors to make the levy.

Instructions 1, 2 and 3 Were Erroneous.

"The scope of the jury's duty is to try the case according to the law and the evidence and while they are entitled to draw inferences, the inferences must be deduced from the testimony and not from conjecture."

Felver v. R. R., 216 Mo. 195.

Tested by this rule, where is the evidence that justifies the inference that there was "a surplus in the Mortuary Fund" (Inst.
304 1, Rec., p. 214) or that "Johnson's share in such excess was sufficient to pay the amount of the premium due" (Irst. 1, Rec., p. 214)? There is not in this record a scintilla of evidence that there was any excess and no facts are predicated in this instruction from which the jury could determine whether there was in fact any excess, and nothing in the record which in the slightest degree tends to show what Dr. Johnson's share of this excess was. Not knowing, as the jury did not know (and were not informed), what amount in the Mortuary Fund would constitute an excess, it was a mathematical impossibility for them to determine what was "Dr. Johnson's share of this excess." The amount of the assessment was \$74.55. But neither Court nor jury, client nor counsel, could possibly say whether Dr. Johnson's share of the excess (an entirely unknown quantity) was more or less than \$74.55. To determine this the amount of the excess must be determined and then the proportion thereof belonging to every other member must be ascertained in ascertaining Dr. Johnson's share. None of these basic facts were proven and, therefore, the instruction amounted to nothing more than a roving commission to the jury to enter the field of conjecture and base their verdict on mere speculation, as contradistinguished from evidence or inferences based upon evidence.

Precisely the same situation is presented by instruction No. 3 (Rec., p. 215). With no evidence whatever as to the amount of the assumed excess on May 2, 1902 (the date of call 95), the jury are permitted to find that there was in the Safety Fund "a sum in excess of \$1,000,000" and are told that it was the defendant's duty to apply "such excess in said Safety Fund," and if it failed to do so, the assessment was illegal. Under the Trustee's contract, it was the de-
305 fendant's duty to distribute the excess as dividends, if there was an excess, but there is absolutely no proof that there was an excess. The positive and uncontradicted proof is that the fund did not exceed \$1,000,000; and though the jury has, seemingly, found that there was an excess in the Safety Fund, they have done so on mere conjecture.

"A jury may draw inferences from evidence, but such inferences must be logical deductions. There is a wide difference between logical inference and bare conjecture."

Ascher v. Shaeper, 25 Mo. App. 1;
Gerrans v. Wenger Mfg. Co., 51 Mo. App. 618;
Glick v. R. R., 57 Mo. App. 97.

"A verdict founded upon mere conjecture or possibilities or probabilities, however reasonably founded, will not be permitted to stand; and the courts should draw with a firm hand the line between evidence and reasonable deduction on the one hand and mere conjecture and speculation on the other."

Bates v. R. R., 98 Mo. App. 330;
Furber v. Bolt Co., 185 Mo. 302;
Stokes v. Burns, 132 Mo. 214;
Holland v. Vinson, 124 Mo. Ap. 417;
Kennedy v. R. R., 128 Mo. Ap., 299.

The Court permitted the jury to find that the assessment was "excessive" without stating to them what facts would make the assessment excessive or requiring them to find such facts.

In Turner v. Snyder, 139 Mo. App. 656 (123 S. W. 1050), the Springfield Court of Appeals says:

"What is a 'reasonable time' * * * will depend upon the circumstances in each case and no general rule that will apply to all cases can be laid down further than to say that the efforts to
306 perform must be pursued with reasonable diligence. What is a 'reasonable time' in a given case is, when there is no dispute as to the facts, a question of law and in that case it is the duty of the Court to instruct whether or not the time was reasonable; but if there is conflicting testimony as to what the facts are, then the Court should give hypothetical instructions, and by them tell the jury what facts it would be necessary for them to find in order to find that the time was reasonable."

Sloop v. R. R., 93 Mo. App. 605;
Skeen v. Thresher Co., 34 Mo. App. 485;
Fugitt v. Nixon, 44 Mo. 295;
Linville v. Welch, 29 Mo. 203.

If this is the rule as to "reasonable time," should it not be the rule also as to a "reasonable sum"? Yet, in this case no facts are hypothecated in the instructions by which the jury are to determine what is a reasonable sum. They are merely told to find whether there was an "excess" and are given no guide or rule for determining what is excessive or what is reasonable.

So also with instruction No. 2 (Rec., p. 215), the burden was improperly cast upon defendant to show that the assessment was necessary, a burden which the contract does not justify. Notwithstanding this, the proof is indisputable that the assessment was necessary and that the maintenance of the contract absolutely required that the assessment should be made. The instruction goes further, however,

and leaves it to the jury to say whether the assessment was "for a larger amount than was necessary" (though there is nothing in the evidence from which the jury could form any judgment on this question) "after giving said Johnson credit for his pro rata share of the excess" in the Safety Fund and Mortuary Fund; when there was absolutely nothing from which the jury could determine what
307 was Dr. Johnson's pro rata share in either of these funds.

We submit that each of these instructions is condemned by the authorities which we have cited.

Proof That This Contract was Abandoned by the Parties was Complete and Convincing and Entirely Uncontradicted.

On the day prior to the last day for payment of call 95, Garland S. Johnson, the son of Dr. Johnson, wrote to the Company that his father had been out of town and had neglected to attend to the payment of the call which he said was due the following day and inquired what steps could now be taken to make payment to have the policy reinstated (Rec., p. 119).

To this the Company replied that they would extend the time for payment of call 95 until July 5th (Rec., p. 120).

On the return of Dr. Johnson his son advised him of what he had done and turned the letters over to him and his father said he would attend to it. All within a few days after the receipts of the letter from the Company. Dr. Johnson made no complaint either as to the amount of the assessment or concerning any of the several matters which are now urged as reasons why he should not have paid this assessment. He lived for five years thereafter; he said he would attend to the matter; he never attended to it. Failing to receive any response from Dr. Johnson prior to and including July 5, 1902, the Company thereafter treated the certificate as lapsed and sent to Dr. Johnson no further notices of assessments.

The question of abandonment of contracts by mutual con-
308 sent has been several times before the Supreme Court of the United States and the Federal Courts in cases arising on insurance policies. There is no charm about an insurance contract that makes it impossible for the parties thereto by their mutual agreement to destroy its benefits, however valuable these may be. It is not against public policy for parties to agree to the resession or annulment of mutual rights and obligations. What the parties to any other sort of contract may do to effectuate abandonment the parties to an insurance contract may do and their acts are just as potent in the one case as in the other, and we submit that in no reported case sustaining the plea of abandonment of an insurance contract is the proof of deliberate and premeditated abandonment so complete as is the proof here.

In Ryan v. Association, 96 Fed. 796, the assocition levied an assessment which the member failed to pay when due and, by its terms, the policy lapsed. The action was by the widow after the subsequent death of Ryan, to recover the amount of the policy, her

claim being that the assessment which Ryan refused to pay was levied in an illegal manner inasmuch as it was based on his then attained age, instead of upon his age at the issue of the policy.

After the lapse and before death, in response to a suggestion by the Company that he reinstate, Ryan responded: "I do not want my policy reinstated." The Court says:

"The question, however, is not upon the strict legal right of the Company to calculate its mortuary calls on the certificate issued to Ryan on one basis or another and to declare the policy forfeited if not paid, but whether Ryan, by his own acts, had terminated
the contract with the association during his life time, for if
309 for any reason it was not in force at Ryan's death, then
plaintiffs cannot recover in this action.

"If it be assumed, for the sake of argument, that the Company could not rightfully base its mortuary call against Ryan on any other age than that he had attained to when the certificate was issued, the fact remains that it claimed the right to advance the age and thus to increase the assessment when necessary so to do. When the demand for the payment of the call was made upon Ryan it was open to him to contest the legality of the call as made and by a proper proceeding in court he could have obtained a judicial interpretation of the contract of insurance; but this he did not do, but on the contrary he chose to exercise another right which was open to him, and that was to terminate the contract relation between himself and the association. The letter of March 26th clearly shows that this was the course he intended to take. The case is not one wherein the Company is seeking after the death of the insured party to establish a right to declare the contract of insurance forfeited by reason of a failure to meet some of its requirements; but the question is whether the insured did not during his life time affirmatively put an end to the contract, so that it had by his action been terminated before his death. * * *

"When the Company, in the letter of March 26th, called his attention to the fact that he had not paid his mortuary call for $23.70 and urged him to continue his insurance in the association by being reinstated as a member, he replied: 'I do not want my policy reinstated.' * * * Ryan did not pay the call for $23.70, nor did he pay the annual dues of $20 which, if the policy had continued in force, would have become due June 17, 1898. * * * No other conclusion can be drawn from his letters and from his acts than that he had become dissatisfied with the association and had 'quit,' and that being the case the contract of insurance was at an
end between the parties, and having been thus terminated
310 by the act of Ryan himself, before his death, the plaintiff
cannot recover thereon."

In the case of Mutual Life Insurance Company v. Phinney, 178 U. S. 327 (44 Law. Ed. 1888), the Supreme Court, by Mr. Justice Brewer, says:

"Confessedly the insured did not pay the annual premium due September 24, 1891, nor that due September 24, 1892, although he lived until September 12, 1893. It appears from the undisputed

testimony that the insured knew when the premium became due in September, 1891. Afterwards he spoke to the local agent, seeking to arrange for the payment of the premium by note, and some three or four months thereafter he surrendered the policy to such agent. It is true that at the time of the surrender the agent told the insured that the policy was forfeited, or words to that effect, and that the insured said to him as the policy had lapsed it was no good to him, and that the agent might have it if he wanted it, but never thereafter until the time of his death, more than a year and a half, was anything said or done by the insured in respect to the policy; no suggestion of payment of premium or anything of any kind in respect to it. He treated the matter as abandoned and gave up to the agent the instrument by which the contract was evidenced."

The lower Court had refused to instruct the jury that "if they found that the insured stated to the agent that he could not pay the premium and thereafter surrendered the policy to the agent, they mutually believing and understanding that it was of no force or validity thereafter, this would constitute an abandonment and rescission of the contract by both parties and put an end to the same.

The Supreme Court says:

"In view of the facts heretofore narrated it is obvious that
311 there was error in the action of the Court in declining to give
this instruction and that the error was material. * * *
In this connection we may be permitted to suggest that no afterthought of ingenious and able counsel should be permitted to disturb the understanding and agreement the parties based upon their belief as to what the law is or to enforce a contract which both parties concluded to abandon."

In Mutual Life v. Sears, 178 U. S. 345 (44 Law Ed. 1096), the Supreme Court, by Mr. Justice Brewer, says:

"This, like the case of Mutual Life Insurance Company v. Phinney, just decided, is an action on an insurance policy issued by the Company, the premiums on which were unpaid before the death of the insured. * * * The answer alleged non-payment of the premiums from 1892 onward and also that subsequent to the failure of the said S. P. Sears to make payment of the said annual premium falling due on said policy May 18, 1893, and subsequent to the lapsing of said policy for failure to make said payment, and after said S. P. Sears was fully informed that said policy had been by it declared lapsed and void for non-payment of premium, this defendant, through its agent, applied to said S. P. Sears to make restoration of said policy by making payment of said defaulted premium and having said policy restored to force, but that S. P. Sears refused to make said payment and refused longer to continue said policy or make any further payments thereon and then and there elected to have the same terminated, and this defendant relying upon the said election and determination of the said S. P. Sears at all times subsequent thereto, treated said policy as lapsed, abandoned and terminated and relying upon said conduct of said S. P. Sears, refrained from taking any further action or step in relation to said policy by way of notice or otherwise, in order to effect the cancella-

tion and termination thereof. A demurrer to this answer was
312 sustained and judgment entered for the plaintiff, which was affirmed by the Court of Appeals (97 Fed. Rep. 986), and the case was thereupon brought to this Court by certiorari. In view of what has already been decided in the case of Mutual Life Insurance Company v. Phinney, it is needless to do more than note the fact that as shown by the answer after the insured had once defaulted in May, 1892, and the second default had occurred in May, 1893, application was made to him by the Company, through its agent, to restore the policy, and that he declined to make any further payments or to continue the policy and elected to have it terminated, which election was accepted by the Company and the parties to the contract treated it thereafter as abandoned. As we held in the prior case, there is nothing in the statute, if controlling at all, to prevent the parties from dealing with that as any other contract, and if they chose to abandon it that action is conclusive."

In Mutual Life v. Hill, 178 U. S. 347 (44 Law Ed. 1097), Mr. Justice Brewer says:

"This case resembles the last three decided, in that it was an action against the Insurance Company on a policy on which the premiums had not been paid for some years before the death of the insured. * * * The answer alleges, among other things, that a premium became due on April 29th, 1887, and that the insured, his wife, and the plaintiffs, failed to pay such premium, by reason whereof the said policy became null and void and of no effect; that during his lifetime it was agreed between the defendant and the said George Dana Hill that the said contract of insurance should be waived, abandoned and rescinded and said George Dana Hill and the defendant then, by mutual consent, waived, abandoned and rescinded the same accordingly; that said Hill refused to make payment of said premium or any part thereof, and then and there intending and for the purpose of inducing the defendant to rely upon the
313 same, informed the defendant that he, the said George Dana Hill, was unable to pay said premium and did not intend to make payment thereof, or of any premium thereafter to accrue on said policy of insurance; that thereafter the said George Dana Hill intended to allow the said policy to lapse and become forfeited for want of payment of said premium or of any future premium accruing on said policy; that said defendant then and there and ever since, relying on the said representations and conduct on the part of the said George Dana Hill, was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned.

"Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the Company to annul and abandon the policy and all rights and obligations on the part of the parties thereto. Under these circumstances, we think the case falls within the same rule as the preceding, and the judgments of the Court of Appeals and of the Circuit Court are reversed and the case remanded to the lower court with instructions to overrule the demurrer to the defendant's answer."

In Mutual Life v. Allen, 178 U. S. 351 (44 Law Ed. 1088), Mr. Justice Brewer says:

"This case is in all material respects similar to that of Mutual Life Insurance Company v. Sears. * * * From the answer it distinctly appears that both Stewart and the Company agreed to the ending of the contract. Under these circumstances and without considering the other question, the judgment of the Court of Appeals and of the Circuit Court are reversed and the case remanded to the lower court with instructions to overrule the demurrer to the answer of the defendant."

In Jones v. Insurance Company (Michigan), 28 I. L. J. 826-834, the Court says:

"The lower court was requested to give the following in-
314 struction: 'If the jury find that Owen Jones made no pay-
ments of assessment after April, 1896, and made no payment of assessment afterwards during his lifetime, and stated to other persons that he had dropped it, or would pay no more assessments upon it, and took no steps to be reinstated, other than to make an application, and took no further steps to keep his membership good or to keep the certificates in force, then I charge you that he had abandoned his certificate and his membership, and this defendant cannot recover, and your judgment should be for the defendant.' This was refused. That one may acquiesce in a forfeiture is undoubtedly true."

In Haydel v. Association (Circuit Court), 98 Federal 200, Judge Adams says:

"So far I have treated this question solely on the evidence of the plaintiff, but as the case now stands, if it goes to the jury it will go to them with this other evidence which has been introduced by the defendant and which is entirely uncontroverted, namely, that prior to March 3rd, 1898 (the last day for payment of call 96), the insured had informed some of the officers of the Company that he did not know that he should keep his policy up; that on the 5th day of March, not having paid his premium or assessment, although it is conceded he had due notice thereof, and although it was conceded by the beokkeeper that he had in fact actual knowledge that it was due on the 3rd day of March, the insured was brought into the office of the defendant Company and had a talk with both the agent and the treasurer of the Company. He told them that he had let his policy lapse and that he was very much in doubt (even after the importunate demands of the agent) whether he had better continue his insurance, and he was told by them at the time if he desired any reinstatement he must proceed in accordance with the terms of the policy and make application therefor. He said the premiums were
too high for him and that he could probably get other insur-
315 ance cheaper than to reinstate his policy. On being impor-
tuned still more by the agents (in their usual diligent manner no doubt) to go on and make this payment and secure the benefits of this insurance, he replied that his present impressions were that he would not do it. He realized and knew he had not paid the premiums and he realized the obligations of the contract and the effect of the non-payment of this assessment, but he said: 'I will postpone it until a few days. I want to think this matter over. I don't like this insurance. I believe I can get cheaper.' This conversation was

on Saturday and he died on Sunday morning. * * * In the light of these facts it would be simply farcical it seems to me to submit to the conjecture and caprice of any set of people the possibility of there being an intent on the part of the Company to waive the payment of this assessment, and whether that intention was relied upon by the insured and acted upon by him and by reason thereof he did not pay it promptly. I do not think there is any evidence on which to submit the case and I shall tell the jury that there can be no recovery."

In all of the foregoing cases, the facts on which the plea of abandonment was sustained, no more clearly indicated an intentional abandonment by the insured than do the facts in this case.

In Lavin v. A. O. U. W., 112 Mo. Ap. 1, one of the defenses was that the insured had abandoned his membership and severed his connection with the association. The jury had found that the assessment had been tendered and refused, though the defendant's contention was that an insufficient amount had been tendered—but that whether the full amount had been tendered or not the insured, by failing to pay any assessments for ten months (though no notices thereof were sent him), acquiesced in the forfeiture and abandoned the contract. The trial court instructed the jury that if
316 between November, 1900 (the date of forfeiture), and July 24, 1901 (the date of his death), "said Lavin did not pay or offer to pay further assessments, nor take any action towards disaffirming his suspension," then he acquiesced in his suspension and the verdict must be for defendant (p. 7).

The Court says:

"This was trying the case according to the theory of defendant's counsel, whose complaint is not of the instruction, but that the jury ignored it, as all the evidence went to show nothing was paid by Lavin after September. This was true; and, if the instruction was sound, the Court should have gone further and ordered the jury to return a verdict in favor of the defendant. The question for us to decide then is, Does the fact that Lavin paid no assessments after September bar a recovery if, as the jury must have found, he had tendered the full amount due in September? * * * He (Lavin) did nothing for ten months; that is during the remainder of his life. Now, if the contention of plaintiff's counsel is correct, during all that time the insurance was in force indefinitely, from the bare circumstance that Walsh (lodge officer) refused payment of one month's assessment when he ought to have accepted it (p. 9). * * * This Court has had occasion to deal with the question and we think the fair deduction from its decisions is that unless there is some better reason than existed in this case for a member's failure to remonstrate against his suspension, or tender assessments after one has been declared, he loses his rights as a member."

The Court then discusses the Mulroy case (28 Mo. Ap. 433) and the renunciation of the doctrine of that case in the later case of Hoeffner v. Grand Lodge (41 Mo. Ap. 359), and says:

317 "Those remarks indicate that this Court deemed it incumbent on a member of a benefit society, when unlawfully sus-

pended or expelled, to act thereafter as a member, if he wished to enjoy the rights and privileges of one; that he might not behave as though the rules of the order were no longer binding upon him, perform none of his duties, pay none of his dues and assessments and still retain the same privileges and benefits he would enjoy if he was carrying his share of the society's burdens. A suspended member must either acquiesce in his suspension or protest against it—must keep his insurance cum onere. If he does not protest formally and by words, he must treat his membership as still subsisting, not alone for the purpose of giving rights, but for the purpose, as well, of imposing burdens. He cannot elect to regard it as at an end, so far as the obligations to pay dues and assessments is concerned, but in existence so far as his certificate of insurance is concerned. He must treat himself as in the order for all purposes, or as out of it (p. 14). * * * He neither protested against his suspension nor took a single step to have his rights restored and keep his contract alive. * * * He knew that if his assessments were not paid by the 28th of each month he would be suspended. * * * It was argued that the defendant should have notified Lavin when it was ready to accept further assessments from him; and this contention finds support in the Nebraska case, supra. We are unwilling to accede to it. By that doctrine an insured party who is wrongly suspended by a benevolent society may continue silent the remainder of his life without forfeiting any right under his benefit certificate, although the order was willing to correct its wrong on being apprised of it. * * * As he did nothing more he ought to be held to have acquiesced in the suspension if he knew of it; or, in any event, to have abandoned his membership. Any other view would be extremely detrimental to the welfare of such societies and, as was pointed out in the case to be noticed, would put a wrongly suspended member in a better position than other members,
318 by continuing his insurance indefinitely without the payment of any premiums or assessments (p. 18) (Glardon v. Sup. Lodge, 50 Mo. Ap. 45). * * * A member wrongly suspended must do something to show he continues to insist on his rights as a member in order to avoid acquiescing in his suspension. This doctrine was recognized in Purdy v. Life Assn., 101 Mo. Ap. 91. * * * In view of all the facts we think no other conclusion can be reached under the evidence than that Lavin, after September, 1900, abandoned membership in the defendant order. The jury disregarded the positive instruction of the Court in giving a verdict for the plaintiff and the judgment on the verdict is therefore reversed and judgment entered here in favor of defendant."

In this case Dr. Johnson knew that assessments were payable quarterly and his certificate was conditioned upon the payment of quarterly assessments, just as in Lavin's case Lavin knew his assessments were payable on the 28th of each month. While in Lavin's case he failed to pay or tender any payments for ten months, Dr. Johnson failed to pay or tender any payments for five years.

In Lavin's case it was claimed and established that Lavin tendered the payment due ten months previous to his death, while in

this case it is indisputably shown that Dr. Johnson refused to pay or tender the assessment due five years.

Lavin failed to apply for reinstatement, but Dr. Johnson refused to avail himself of the privilege of reinstatement tendered to him by the Company.

The upholding of Lavin's claim would have given him ten months' insurance free of cost to him and at the expense of his associate members, while the upholding of the plaintiff's claim here will give Dr. Johnson five years' insurance free of cost to
319 him and at the expense of his associate members.

Every reason that existed in the Lavin case for directing judgment in favor of the defendant exists in this case for a like direction and every material circumstance affords even a stronger reason for a directed verdict in favor of defendant. To uphold the plaintiff's claim would, in the language of the Glardon case (50 Mo. Ap. 45, 59),

"put a premium upon his negligence in not taking means to exhaust his remedy of reinstatement within the order, in not appealing to the judicial courts after having exhausted his remedy within the order, by mandamus or otherwise, or at least in not giving some evidence of his continued dissent by tendering his stated dues or otherwise; and it would work an obvious injustice to the other members of the class to which he belonged, who must contribute the sum named in his benefit certificate in the event of his death. Such a certificate involves a scheme of insurance under which the living members of a class contribute a certain sum to make up a fund for the benefit of the widow and children or other beneficiary of a deceased brother. There is an obvious injustice in requiring them to make a contribution to pay such a benefit to the family of a deceased member who has for a long time ceased himself to make any contribution on his part; and this is so, although he may have ceased in consequence of a void suspension or expulsion, which he has taken no steps to disaffirm, but in which he has passively acquiesced. We take the just rule to be that even in the case of a void expulsion or suspension, the expelled or suspended member is under a duty to his co-contributors to affirm or disaffirm the act of suspension or expulsion within a reasonable time, and in some distinct manner under the circumstances; and that where he takes no steps of any kind to secure reinstatement, allows dues which had accrued and were payable prior to the date of his expulsion
320 to remain unpaid, and neither tenders such dues or any subsequently accruing dues, he must be taken to have acquiesced in and consented to the sentence of expulsion or suspension. We * * * must hold that the defendant had established an incontestable state of facts showing, as a conclusion of law, that the plaintiffs have no right of recovery under the doctrine of this Court in the case of Hoeffner v. Grand Lodge, 41 Mo. Ap. 359."

Conclusion.

We submit that this case was submitted to the jury "upon mere suspicions or conjectures of the truthfulness of the facts sought to

be established" and that it ought to be reversed outright on the authority of Bates v. Brams, 132 Mo. 214, as well as because of the manifest purpose and intent of Dr. Johnson to acquiesce in the forfeiture, and abandon his contract. It is inconceivable that he, one of the parties to the contract, should have thought or understood that this contract was in force. He never breathed such an idea to anyone during the five years that he survived the forfeiture of this insurance, and to permit his beneficiary to recovery that for which he did not pay, for which he refused to pay, would be a rank miscarriage of justice which no court should tolerate.

Respectfully submitted,

JONES, JONES, HOCKER & DAVIS,
WASH ADAMS,
LEWIS SPERRY,
Attorneys for Appellant.

321 New Haven County Superior Court, March 23, 1910.

CHARLES H. DRESSER of Hartford, Connecticut; WILBUR H. SQUIRE of Meriden, Connecticut; Hugh J. Wiley of New Haven, Connecticut; F. L. Perdue of Terre Haute, Indiana; E. W. Amsden of Ormond, Florida; R. H. Davidson of Ballston Spa, New York; H. McClary of Southington, Connecticut; R. N. Stanley of Highland Park, Connecticut; A. J. Bostwick of Sharon, Connecticut; Charles Donnelly of Covington, Kentucky; Joseph Bradford of Norwich, Connecticut; William H. Adams of Worcester, Massachusetts; Henry A. Weber of Detroit, Michigan; W. J. M. Gordon of Cincinnati, Ohio; W. C. Van Loon of Cincinnati, Ohio; C. A. Roebuck of Williamstown, Massachusetts; O. S. Chapman of Minneapolis, Minn.; J. M. Bugg of Chipley, Georgia; Charles Ammen of New Orleans, Louisiana; Adolph Schmidt of Brooklyn, New York; A. B. Smith of Morristown, Vermont; William Booth of Clinton, Illinois; W. A. Oldham of Springfield, Missouri; C. H. Robinson of St. Paul, Minnesota; Porter Farley of Rochester, New York; Herbert Myrick of Springfield, Massachusetts; A. B. Stockwell of Windsor Locks, Connecticut; W. L. Dodds of Buffalo, New York; O. W. Kerner of Kernersville, North Carolina,

v.

THE HARTFORD LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT; Security Company of Hartford, Connecticut; George E. Keeney of Somersville, Connecticut; Lewis Sperry of East Windsor Hill, Connecticut; Rienzi B. Parker of Hartford, Connecticut; Louis E. Gordon of Hartford, Connecticut; Everett J. Lake of Hartford, Connecticut; James H. Knight of Hartford, Connecticut; Raymond G. Keeney of Hartford, Connecticut, and Andrew Gordon of Hazardville, Connecticut.

322 *Judgment.*

This action was brought by the plaintiffs in their own behalf and for the benefit of other creditors and certificate holders in similar situ-

ation as themselves against the defendants named in the complaint, claiming that prior to 1880 there had been invented a plan of assessment life insurance which was designated as the Safety Fund Plan, and published and generally known under that name, the principal features of which plan are described as follows: Each person applying for insurance under the plan was to pay an admission fee of $8 for $1,000; $12 for $2,000; $15 for $3,000; $18 for $4,000; $20 for $5,000; and $40 for $10,000, and a medical examination fee estimated at $3, which medical examination fee was to be paid to the physician; also to pay annually, for the sole purpose of paying the expense of said insurance on said Safety Fund Plan, $3 for each $1,000 of insurance, also to pay as mortuary payments or assessments to meet death losses an amount graduated according to the policyholder's age, when the assessment was made, the amount of his policy and the total amount of insurance or indemnity in force with the company. Furthermore, each member was to pay $10 on each $1,000 of his insurance to make up a "Safety Fund." This Safety Fund was to be deposited with the defendant, The Security Company of Hartford, Connecticut, as trustee. As often as the receipts for said fund amounted to a sufficient sum to purchase $1,000 par value of United States bonds, such trustee was to make investments of such funds therein and register the same in its name as trustee of the Safety Fund of said insurance company. The earnings of this Safety Fund after it reached $300,000, and all contributions to said fund after it reached $1,000,000 in United States bonds, par value, were to be divided up among the outstanding certificate-holders whose certificates had been in force five years, in proportion to the face amount of their certificates. In case of failure of any certificate-holder to make payments in accordance with his agreement, his interest in said Safety Fund and all his claims were to cease; and when the face amount of outstanding certificates was less than $1,000,000 it should be divided among the outstanding certificate-holders in proportion to the face amount of their certificates. And further said sum was to belong absolutely to the certificate-holders and
323 the company was to have no interest whatsoever therein, except in its application for the benefit of the certificate-holders in accordance with the terms of said plan. And claimed that at some time in the year 1880 the defendant, the Hartford Life Insurance Company, adopted said plan and issued certificates in accordance with the terms thereof; and that the plaintiffs and a large number of others held certificates issued in accordance therewith and similar to Exhibit "B" annexed to said complaint; and claimed that in pursuance of certain purposes for its own benefit said insurance company offered various inducements to induce the certificate-holders in its Safety Fund department to surrender their certificates in said department and to take out in place thereof policies in the stock department of said company, and that said insurance company had diverted from the moneys and property of said Safety Fund department large sums of money to the use and benefit of itself and the managers and stockholders of its stock department, and made other allegations, as

will appear from said complaint, and asked relief as therein set forth. Said action came to this Court on the first Tuesday of November, A. D. 1906, and thence by continuance to the first Tuesday of January, 1907, when and where the parties appeared and were at issue on demurrers as on file, and the Court on the 11th day of October, 1907, sustained said demurrers and adjudged that the complaint was insufficient, and that the defendants recover the costs, and thereupon the plaintiffs appealed from said judgment to the Supreme Court of Errors to be held at Bridgeport within and for the Third Judicial District on the fourth Tuesday of October, A. D. 1907, and said Court having heard said case rendered judgment on June 9, 1908, finding error and overruling said demurrers in part and sustaining said demurrers in part, and remanding said cause to this Court for further proceedings as will appear in said judgment; and thereupon the defendant, the Security Company, filed its answer as on file, and the other defendants filed their answers as on file, and the case was heard on the demurrer of the plaintiffs to the answer of the Security Company, and the Court on the 17th day of December, 1908, rendered its decision sustaining the demurrers to the first, second and third defenses of said answer, and overruling the demurrer to the fourth defense; and the case thereupon came by regular continuances to this Court on the ? day of January, 1909, when the Court made an order that the issues raised by the 21st paragraph of the answer of the Insurance Company to the 29th paragraph of the complaint, and paragraph 10 of the plaintiffs' reply to said answer, be heard and determined before any other issues were
324 tried, and thence said case came by regular continuance to the
27th day of May, A. D. 1909, when the parties were at issue as on file, and thereupon a hearing was had on said issues, but the said The Security Company did not appear, and the Court (Judge Shumway presiding) after said hearing filed a memorandum of decision as on file under date of July 21, 1909, and on March 23, 1910 formally entered judgment as on file to conform to the date of this judgment; and thence said cause came to this Court on the 10th day of November, A. D. 1909, when all the parties duly appeared and were heard on the other issues in said case not disposed of by the aforesaid judgment, and the Court having heard the parties finds certain issues in favor of the plaintiffs and certain others in favor of the respective defendants, as herein set forth, and at the request of the plaintiffs specially sets forth the facts upon which the judgment is founded as follows:

The Safety Fund plan of insurance under which the certificates in this case were issued, and with which they comply in terms, is substantially as follows: Each person applying for insurance under the plan was to pay an admission fee of $8 for $1,000; $12 for $2,000; $15 for $3,000; $18 for $4,000; $20 for $5,000; and $40 for $10,000, and a medical examination fee estimated at $3, which medical examination fee was to be paid to the physician; also to pay annually expense dues of three dollars for each $1,000 of insurance, also to pay as mortuary payments or assessments to meet death losses an amount graduated according to the policy-holder's age, when the

assessment was made, the amount of his policy, and the total amount of insurance or indemnity in force with the company. Furthermore, each member was to pay $10 on each $1,000 of his insurance to make up a Safety Fund. This Safety Fund was to be collected by the defendant, The Hartford Life Insurance Company, and by it deposited with the defendant, The Security Company of Hartford, Connecticut, as trustee. As often as the receipts for said fund amounted to a sufficient sum to purchase $1,000 par value of United States bonds, such trustee was to make investments of such funds therein and register the same in its name as trustee of the Safety Fund of said Insurance Company until said fund so invested would amount to one million dollars par value of United States bonds. The earnings of this Safety Fund after it reached $300,000 and all contributions to said fund after it reached $1,000,000 in United States bonds, par value, were to be paid over by said Security Company to said Insurance Company and by it be divided up among the outstanding certificate-
325 holders who had contributed five years prior to the date of any such division their stipulated proportion or payments to said fund, in proportion to the face value of their certificates.

In case of failure of any certificate-holders to make payment in accordance with his agreement, his interest in said Safety Fund and all his claims thereon ceased. When the face amount of outstanding certificates becomes reduced by death, lapse or other cause to the amount of one million dollars, the disposition of said Safety Fund in such case was adjudicated by this Court in the judgment referred to above rendered by this Court, Judge Shumway presiding, as appears therein.

The Security Company and the Hartford Life Insurance Company on December 31, 1879, and before the Hartford Life Insurance Company commenced the issue of such certificates, executed an agreement, a copy of which is incorporated in each certificate and is found incorporated in Exhibit "B" in this case, under which agreement the Security Company assumed the management of the Safety Fund in accordance with the terms of the contract contained in the certificate, and with the plan as thus set forth, and continued the management of such business in accordance with the terms of the agreement down to a period in 1890.

At the solicitation and by the procurement of the Hartford Life Insurance Company, the Legislature of 1889 passed a private act, approved April 10, 1889, which is as follows:

"Resolved by this Assembly: That the Security Company, a corporation located in Hartford, be and it is hereby authorized to invest the funds known as the Safety Fund, which it now holds or may hereafter receive from the Hartford Life and Annuity Insurance Company, a corporation also located in said Hartford, under a contract between said companies dated the thirty-first day of December, 1879, in trust for the benefit and security of certain holders of certificates of membership in said Hartford Life and Annuity Insurance Company, in such other securities, in addition to United States bonds, as the life insurance companies of this State are by law authorized to invest in, instead of being compelled to invest all said funds in United

States bonds as specified in said contract; provided, such investments of said funds in other securities than United States bonds, shall be made with the consent and approval of said Hartford Life and Annuity Insurance Company; and, provided further, that nothing in this resolution shall be so construed as in any way to vary,
326 alter or change the purposes, conditions or stipulations of such
trust as set forth in said contract, except as to the kind of securities in which the same may be invested."

Thereafter the Security Company did not comply with the provisions of the contract executed in December, 1879, in regard to investments. It never accumulated a fund of one million dollars, par value, of United States bonds, although it did accumulate a fund which in June, 1894, amounted to one million dollars' value of securities. Relying in good faith on the provisions of the act of 1889 above quoted, in the year 1890 it sold United States bonds amounting to $501,000 par value then held by it under the terms of said trust agreement and received therefor $97,366.85 over and above the par thereof, which United States bonds had been purchased at a premium of $115,689.50, making the whole cost of the said bonds $616,689.50. Said Security Company thereupon in accordance with the provisions of said act of 1889, but in violation of said contract with said certificate-holders made in 1879 as aforesaid, invested the proceeds of such sale, together with other Safety Fund payments thereafter received, in such other securities as are required for the investment of insurance companies under the laws of this State, but not in United States bonds as provided in said agreement. The amount of money so received and invested, together with the premiums paid, including the premiums paid on the United States bonds so converted, amounted to much more than one million dollars, to wit, upwards of $1,090,000.

Said act of 1889 above stated has been ruled by this Court on demurrer to the answer of the defendant, the Security Company, to be unconstitutional as impairing the obligation of the contract embodied in the trust agreement with the certificate-holders.

As a result of such investments in other securities losses have been incurred, and the actual value of said fund now remaining in the hands of the Security Company on account of said Safety Fund is somewhat less than one million dollars. Many of said securities are not such as are authorized by the law of this State concerning the investments by trustees, as appears by the disclosure of the Security Company on file in this case, and some of these securities have today no market value and are paying no income.

This Court however finds that the illegal investments made by the Security Company under the provisions of the private act of the General Assembly of 1889 were not made to further any purpose of its own, but were made in reliance upon said act which was passed in the supposed interest of the beneficiaries, or certificate-holders; that such illegality differs from illegality knowingly or negligently
327 indulged in; that the loss which has fallen upon the Security
Company from such illegal investments of the Safety Fund has its source in misfortune and not in culpability.

By reason of the change so made in the investments of said Safety

Fund, there was received as income by said Security Company down to the commencement of this action, $315,828.41 in excess of what the income would have been had said United States bonds not been sold and all investments of said Safety Fund had been made by the trustee only in United States bonds.

Practically the only issue of United States bonds in the market for sale from January, 1890 to March, 1895, were the four per cent. bonds maturing April, 1907. The market price of said bonds in January, 1890, was $126\frac{1}{2}$ of par, and the price thereof gradually fell from time to time until March, 1895, when a new issue was made of four per cent. bonds to mature in 1925. The market price of said four per cent. bonds of 1907 then ranged from 111 to $112\frac{3}{4}$ of par, and the market price of said four per cent. bonds of 1925 ranged from $119\frac{1}{8}$ to $120\frac{1}{2}$. The Security Company was not required to establish a sinking fund. The agreement makes no reference to such a fund, although United States bonds were then (December, 1879) at a small premium of about three per cent.

The situation presented by the beneficiaries was not analogous to that of a life tenant and remainderman, but was more nearly like a beneficiary entitled to the interest, and eventually to the principal of a fund. It was as important for the early certificate-holders to receive all the income as that a sinking fund should be established to lighten the possible burden that might fall on certificate-holders at the maturity of the bonds, if the $10 payments then received were applied to the purchase of bonds to restore the Safety Fund to $1,000,000, par value, of United States bonds. A continuation of the business was then contemplated with a constant flow of $10 payments into the Security Company from new certificate-holders. By having no sinking fund, the total net income went to the beneficiaries instead of a part of it into an investment to await the maturity of the bonds, thus in effect the beneficiaries became the holders of a sinking fund, since if at maturity more than the $1,000,000 was necessary to procure $1,000,000 par value, of United States bonds, it would come from them in diminished returns from the $10 payments, or in case (as happened) the business was not continued, then equitably from diminished payments of income until the fund was restored. As a matter of fact, at the maturity of the bonds of 1907, United States bonds paying two per cent. could have been purchased nearly at par.

328 Under the investment policy pursued after 1889, a much larger sum arising from unused $10 payments was returned, and much earlier, to the use of certificate-holders, and also a much larger amount of income was so returned, than would have been returned if the investments had been made in United States bonds.

By the terms of said trust agreement above referred to, it appears that the Security Company agreed with the Hartford Life Insurance Company and with the certificate-holders, that "the necessary expenses connected with the management of said fund shall be limited to the ordinary commissions for purchasing or selling and transfer or transmission of the hereinafter mentioned bonds, together with the cost of the stationery and postage used in replying to requests

for information of the condition of said fund, and the actual cost of any judicial action needed to determine the legal status of said fund. All other expenses to be included in and covered by such reasonable charges as shall be made for the compensation of the trusteeship, to be determined by the amount of time and labor involved in the execution thereof."

On the date of the execution of said trust agreement, the Security Company by its president and secretary wrote a letter to the president of the Insurance Company, and the same day the Insurance Company by its president and secretary wrote a similar letter to the president of the Security Company, in both of which it was stated that it was agreed that the compensation referred to in said contract should be as follows: "The rate to be one per cent. on all sums up to and not exceeding $200,000, but in no year to be less than $500.00; and from $200,000 to $400,000 to remain at $2,000 per annum; and on all amounts exceeding $400,000 to be one-half of one per cent. per annum."

This was done before any certificate of membership had been issued by the Insurance Company and before any opportunity had been had to determine the amount of time and labor involved in the execution of the trusteeship.

Thereafter, at the end of each six months, the Security Company computed its compensation under its interpretation of said agreement with the said Insurance Company, and submitted said compensation to said Insurance Company for its approval, and, if so approved, it withdrew said amount and took the same as its compensation as trustee for the preceding six months.

No complaint was ever made of this compensation by any certificate-holder down to the commencement of this suit, but it did not appear that the certificate-holders knew of the rate or amount of compensation which said trustee had received or was receiving.
329 The amount of income collected under said trust agreement by the Security Company was $970,175.83 down to September 18, 1908, and the Security Company, acting under its interpretation of the terms of said letter, received and credited to itself as compensation, with the consent of said Insurance Company, and deducted from said income, the amount of $116,741.16, being more than twelve per cent. of the income, and then paid over to the Insurance Company for credit on the assessments of the certificate-holders in accordance with the terms of the contract, the balance of the income after deducting its compensation and other expenses, the latter amounting in all to over fifteen thousand dollars.

Since 1892 the stated compensation of the trustee has been calculated and received on amounts which in each year exceeded one million dollars.

The ordinary compensation of a trustee for holding and managing trusts consisting of personal property is five per cent. of the income. Under the contract, the Security Company, down to March, 1899, in addition to taking care of and managing said Safety Fund, and turning over the income to the Hartford Life Insurance Company semi-annually, in pursuance of the contract, kept an account of the

ten dollar payments with the names and addresses of the certificate-holders from whom said ten dollar payments were received. Since January 1, 1891, the fair value of the services of the trustee does not exceed eight per cent. of the gross income of the fund for each year, but its charges for such services have largely exceeded that amount. The amount of such excess, together with simple interest thereon calculated from the close of each year, when such charge was made, amounts to $40,046.36.

And this Court further finds that said Security Company was not obligated under the terms of said trust agreement with the Hartford Life Insurance Company and with the certificate-holders, to maintain a sinking fund;

That the act of the General Assembly of 1889, to which reference is made above, was passed without notice to, or the consent of, the holders of certificates of insurance issued by said Insurance Company, and was unconstitutional and void; that if the Safety Fund is now invested in United States bonds an annual income of less than two per cent. will be received on the amount so invested, and that if said fund is now invested in securities (other than United States bonds) in which the law of this State authorizes trustees to invest trust funds, an approximate annual income of four per cent. will be received on the amount invested, and that it is within the power of this Court of Equity to protect the said certificate-holders from the great and unnecessary loss and waste of approximately twenty
330 thousand dollars per year, which loss and waste will result if said Safety Fund is now invested in United States bonds.

It was claimed by the plaintiffs that the defendants were levying assessments unnecessary in amount and number for their own wrongful purposes. The Hartford Life Insurance Company levied the assessments provided for in the plan and in the certificate above set forth, quarterly, and the proceeds of such assessments when received by said Insurance Company were paid into and credited to the mortuary fund described in the contract of insurance. The Hartford Life Insurance Company did not levy assessments unnecessary in amount or number. It appeared, however, that the allowance made for discontinuance of membership, although made in good faith, often exceeded the actual amount necessary to cover the deficiency in payments arising from such discontinuances, and that from that source margins of excess of payment arose from time to time consisting of the difference between the aggregate amount actually received by said Insurance Company from such quarterly assessment and the amount needed to pay the losses for the corresponding quarterly period. It also appeared that although the Company in practice levied assessments to cover the full amount of the face value of the certificates for each death during the previous quarter, they deducted *an* actual payment from the face of such certificates a certain proportion of the assessment which would have been due from the certificate-holder had he survived the quarter, which sum is proportioned to the portion of such quarter which had elapsed at the time of the death of such certificate-holder, and there was, therefore, a margin arising from this circumstances between the

amount of the losses paid and the amount of the losses assessed for. These margins accumulated from time to time in the hands of the Hartford Life Insurance Company in its mortuary fund. have always been and are now in constant use in the prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments, by which receipts the said fund is constantly reimbursed. Said accumulation of margins, although in constant use, are capable of exact determination in amount, and now amount to many thousands of dollars.

The plaintiffs claimed it was improper and wrongful to accumulate these margins and to carry this balance in said mortuary fund, and claimed that said balance of margins should be distributed among the outstanding certificate-holders, but it is held that it is proper and reasonable that the Company should hold some such fund for the purpose of enabling it to pay losses promptly, but it is not
331 necessary for that purpose that the Company should hold more than the amount of one average quarterly assessment for the previous year.

Said fund belongs to the certificate-holders and is held in trust for them, and the Hartford Life Insurance Company has the right to hold the same, to the extent above stated, in trust for said certificate-holders and for application to the settlement of death claims, and said fund should be ultimately distributed in the settlement of death claims and as hereinafter provided, before said certificates in accordance with their provisions are extinguished and the Safety Fund distributed in accord with the judgment of this Court, Judge Shumway presiding, above referred to.

It is provided in the certificates that they are payable solely from the mortuary fund. It is also provided by the certificates and by the trust agreement hereinbefore referred to, that on the distribution of the Safety Fund among the certificate-holders, all liability on the certificates shall thereupon cease and determine.

It was claimed by the plaintiffs that the expense dues received by the Hartford Life Insurance Company could be levied only for the purpose of paying the expenses of the Safety Fund Department of the Hartford Life Insurance Company, and that as the Company ceased to issue new certificates and transact new business at a period not later than 1899, the Hartford Life Insurance Company was not entitled to said expense dues after that period, and that the plaintiffs were entitled to an account for the amount of such expense dues received after the payment of the expenses actually incurred by the Hartford Life Insurance Company in connection with the business. It has been ruled by the Supreme Court of this State, and is so held by this Court, that said three dollar expense dues did not become a part of the funds of the Safety Fund Department, but that they belong to the Insurance Company without accountability to the certificate-holders, and that said Company is entitled to collect the same so long as there is any outstanding certificate of insurance. The plaintiffs made no claim at the time of the trial for any such account of said expense dues, and made no claim for relief on account of the

collection or receipt of the same, and the plaintiffs are not entitled to any such relief.

It was also claimed that the Insurance Company had from time to time diverted moneys and property of the Safety Fund Department from such Safety Fund Department to the Stock Department without right.

The plaintiffs after submitting evidence on the trial in support of said claim withdrew their demand therefor and admitted that the circumstances appearing to indicate such diversion arose
332 from the difference in the method of keeping accounts appearing by their reports to the Insurance Department, and it is found that the Insurance Company has not wrongfully diverted such sums from the Safety Fund Department to the uses of the Stock Department.

It was claimed by the plaintiffs that the defendants other than the corporations, as officers and agents of said Insurance Company, took their offices with knowledge of the various wrongful and fraudulent acts recited in the complaint, and had accepted the benefits of said fraudulent transactions. But it is held that said defendants, namely, George E. Keeney, Lewis Sperry, Rienzi B. Parker, Louis E. Gordon, Everett J. Lake, James H. Knight, Raymond G. Keeney, Andrew Gordon, Arthur F. Eggleston and Charles H. Bacall became connected with said defendant Insurance Company and took their positions in said Company at a date subsequent to the acts complained of and recited in said complaint, and have not participated in and are not guilty of any fraudulent acts or transactions in connection with the management of the Safety Fund Department of said Insurance Company.

Plaintiffs are not entitled to an account, a receiver, damages, or other relief except as herein granted.

Defendants Charles H. Bacall and Arthur F. Eggleston died after the commencement of this action and before any judgment was rendered therein.

Whereupon it is adjudged and decreed, that said mortuary fund of the Men's Division arising from the excess of the amount received for quarterly assessments over the amount necessary for the payment of losses for said quarter, as above described, or from any other source, together with all income or interest thereon, belongs to the certificate-holders in the Men's Division of the Safety Fund Department, and the Insurance Company is reasonably entitled to hold the same as a necessary and proper fund for the settlement of death claims on the certificates of insurance in said department.

Further, that in the future, any excess in said fund above the average of the four preceding quarterly assessments in said Men's Division of the Safety Fund Department of said Company shall be distributed to the certificate-holders in diminution of assessments by crediting and applying such excess on account of the next succeeding assessment.

Also, that when the amount of outstanding certificates of insurance in the Men's Division of the Safety Fund Department falls to the face amount of one million dollars and the Safety Fund is dis-

tributed among the holders of said certificates, the balance, if
333 any, of said mortuary fund remaining in the hands of the
Hartford Life Insurance Company, shall be distributed pro rata among the certificate-holders whose certificates are outstanding at that time.

That said Security Company as such trustee within eighteen months from and after July 1, 1910, shall sell and dispose of all present securities and investments of said Safety Fund, other than those which it shall be willing to hold as securities authorized by law, for trust investments, and shall invest the proceeds of such sales in such securities (other than United States bonds) in which trustees are allowed to invest under the law of the State of Connecticut.

That said Security Company, as such trustee, may and shall continue to hold as a part of said Safety Fund, any and all securities (other than United States bonds) in which said fund is now invested, and which constitute investments in which trustees are authorized by law to invest, and which said trustee shall decide to retain as a part of said Safety Fund.

That all of said trust securities which shall be retained by said Security Company in said Safety Fund, shall be valued and so held at their market value at the date of this judgment, and that all securities hereafter purchased by said trustee as a part of the investments of said Safety Fund shall be taken and held as a part of said Safety Fund at their cost price.

That as to all bonds or obligations payable at a fixed time in the future which shall be so retained or hereafter purchased by said trustee as a part of said Safety Fund, the Security Company shall create and carry a sinking fund out of the income of said respective securities for the amortization of the premiums or bonuses above par, which there may be in the valuation or cost of said securities.

In case the present market value of all the securities which are now held by said trustee and which it shall retain as a part of said Safety Fund, together with the cost price of all securities purchased by said trustee under the provisions of this judgment, shall not equal the sum of one million dollars on or before January 1, 1912, then said Security Company, out of its own funds, shall furnish and pay into the principal account of said Safety Fund a sum sufficient to make said fund up to one million of dollars, which sum so paid in (if any) shall be invested by said trustee in securities in which trustees shall then be authorized by the law of this State to invest.

That said trustee shall have the right and power to sell and transfer from time to time any securities which it may hold in said fund, and shall invest the proceeds of said sales in other securities in which said trustees shall be authorized to invest.

334 That the Security Company credit to the income account of the Men's Division of the Safety Fund Department, the sum of forty thousand and forty-six dollars and thirty-six cents ($40,046.36), being the excess of the amount hitherto received by it over the compensation which this Court has allowed, with interest thereon as above described.

That the Security Company hold said sum of forty thousand, forty-six and 36/100 dollars ($40,046.36) as a separate fund until the conversion of the securities as provided above, and if under this judgment the Security Company is compelled to make up from its own funds any of the principal of the Safety Fund, then the Security Company is authorized and directed to apply such sum of $40,046.36, with the accumulated interest realized thereon from the date thereof, in whole or in part to reimburse said Security Company, so far as may be, for the sum so made up by it. If after the conversion of the securities and the re-establishment of the Safety Fund as provided above, the whole or any portion of said $40,046.36 remains unapplied for the purpose of so reimbursing said Security Company, the Security Company is directed to re-transfer it to the regular income account of the Safety Fund.

That when the conversion and purchase of securities is completed as hereinbefore authorized, the Security Company shall file in this Court a report or account of its proceedings in detail, sworn to by one of its executive officers, and which shall show an investment of one million dollars as the principal of said Safety Fund, and the payment of any excess under this judgment, to the income account of said Safety Fund.

That the said Security Company from this time henceforth shall be entitled to charge and receive for its services as such trustee a sum equal to eight per cent. of the gross income received from said investments, to be paid in semi-annual payments of four per cent. each.

In addition to said eight per cent. of the gross income as compensation, and in addition to such expenses as are authorized by said trust agreement of December 31, 1879, said trustee shall be entitled to be reimbursed for all necessary legal expenses incurred in the protection, and collection of any obligation which shall at any time be held under the authority of this judgment as a part of the principal of said Safety Fund.

It is further adjudged that this litigation is of such a character and the results of such value to all the present certificate-holders who as a class are interested in this litigation that an allowance should be made from the accounts of the safety fund in aid of the plaintiffs in the payment of the expenses, including the
335 attorney's fees, involved in the conduct of this litigation.

Whereupon it is further adjudged that said Security Company pay to Henry Stoddard, Talcott H. Russell, and John K. Beach, attorneys for the plaintiffs, on or before the expiration of ten days after the judgment in this case shall become final, the sum of twenty-five thousand dollars ($25,000), which sum shall be paid out of the principal of said Safety Fund now in its hands, which shall be applied by the plaintiffs and their said counsel to aid in the settlement of the expenses and attorneys' fees of the plaintiffs in this action, for which the said plaintiffs shall give to said Security Company a receipt certifying to said payment in accordance with this judgment, which certificate shall be carried by said trustee as a part of said principal of the Safety Fund, for reimbursement as herein-

after provided, and said payment shall not constitute a deficiency pro tempo in the principal of said fund.

It is also adjudged that said trustee shall semi-annually pay out of and from the income received from the investments of the principal of said fund, the sum of one thousand dollars, and shall pay the same into the principal fund, and shall endorse said payment upon said certificate originally given under this judgment for the payment of said sum of twenty-five thousand dollars ($25,000), which payment, when so endorsed, shall constitute a repayment pro tanto of said sum, and said trustee shall continue to make said semi-annual repayments until said sum of twenty-five thousand dollars ($25,000), has been so repaid, and said Security Company shall be under no other obligation or liability to repay said sum of twenty-five thousand dollars ($25,000) or any part thereof.

It is also adjudged that said Security Company shall conform to all of the agreements contained in said trust contract of December 31, 1879, other than the one with reference to the investments of said trust funds, as to which this judgment shall control; and that the defendant, the Hartford Life Insurance Company, keep said Security Company correctly informed of the names and addresses of the certificate-holders in the Men's Division of the Safety Fund Department, and of the number and amount of such certificates in accordance with the terms of the Safety Fund contract, and furnish said Security Company such other information as may be required in accordance with the terms of said contract.

It is also adjudged that no costs shall be taxed by or in favor of any party hereto.

CURTIS, *J.*

336 STATE OF CONNECTICUT,
New Haven County,
Clerk's Office, ss:

I, John Currier Gollagher, Clerk of the Superior Court within and for the County of New Haven, in the State of Connecticut, and keeper of the records and seal thereof, do hereby certify that the above and foregoing is a true copy of record. And I further certify that the time for appealing from said judgment has expired and that said judgment is a final judgment in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at New Haven, this 25th day of August, A. D. 1910.

[SEAL.] JOHN CURRIER GOLLAGHER, *Clerk.*

337 That in the additional brief filed by the appellant in the said Kansas City Court of Appeals and transferred with the record to said Supreme Court, appears the following statement of points, to-wit:

338 In the Kansas City Court of Appeals.

No. 9402.

NANNIE M. JOHNSON, Respondent,

vs.

HARTFORD LIFE INSURANCE COMPANY, Appellant.

Additional Brief and Argument for Appellant.

Points.

I.

The defense of abandonment or acquiescence in the declared forfeiture was complete and undisputed.

II.

The Safety Fund is not within the jurisdiction of the courts of Missouri, and the courts of Missouri cannot adjudge the partial distribution thereof by way of credit against the defaulted assessment; much less can the courts of Missouri declare said trust void ab initio while it is still an active trust, the administration of which is being directed by the courts of Connecticut.

339 III.

The Safety Fund is not in the custody of or subject to the control of the defendant and to require defendant to give credit, as against the defaulted assessment, of the insured's interest in said fund, is a denial of justice and the taking of the defendant's property without due process of law.

IV.

The Safety Fund is an active trust of which the insured has heretofore received every benefit to which he was entitled therefrom. Said trust is still being administered. It is beyond the power of the courts of this State to deal with said fund or determine contract rights connected therewith as though said fund were illegal and void ab initio.

V.

The policy contract properly construed justified the levying of the defaulted assessment, and as it is stipulated that the insured had due notice thereof and it is not disputed that the assessment was never paid, judgment should be entered here in favor of defendant.

VI.

By the judgment appealed from the defendant is deprived of its property without due process of law, in violation of Sec. 30, Art. 2, Constitution of Missouri, and in violation of Sec. 10, Art. 1, of the Constitution of the United States, and of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and defendant is denied justice contrary to Art. II, Sec. 10, of the Constitution of Missouri.

340 VII.

By the admission of evidence, the instructions to the jury and the judgment of the Court the obligation of the contract sued on is impaired in violation of Sec. 10, Art. I, of the Constitution of the United States, and defendant is denied due process of law and the equal protection of the laws contrary to Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and contrary to Sec. 30, Art. 2, of the Constitution of Missouri.

VIII.

By the judgment appealed from the defendant was deprived of the right to trial by jury guaranteed by Sec. 28, Art. II, of the Constitution of Missouri.

IX.

By the judgment appealed from the defendant is deprived of the protection of Art. II, Sec. 1, of the Constitution of the United States, which requires that full faith and credit shall be given to the judicial proceedings of sister states.

341 That the opinion of the Kansas City Court of Appeals filed with the order transferring said cause to the Supreme Court of the State of Missouri is in the words and figures following, to-wit:

342 In the Kansas City Court of Appeals, March Term, 1912.

No. 9402.

NANNIE M. JOHNSON, Respondent,

v.

HARTFORD LIFE INSURANCE COMPANY, Appellant.

Appeal from Henry Circuit Court.

In 1888, defendant, a life insurance company incorporated under the laws of Connecticut, issued to James T. Johnson, a citizen of

Henry County, an assessment policy in its "Safety Fund Department," by the terms of which it agreed "that ninety days from the receipt by the president or secretary of said company of satisfactory proofs * * * of the death of the herein named member, while this certificate is in force, all of the conditions hereof having been conformed to by the member, there shall be due and payable, out of the aforesaid mortuary fund, and not otherwise, the indemnity of five thousand dollars * * * to his wife, Nannie M. Johnson."

The assured died in January, 1907, and, claiming the certificate was in force at the time of his death, plaintiff, his widow, brought this suit to collect the indemnity therein provided.

The answer pleaded "that the certificate required the assured to pay periodical assessments; that five years before his death assessment numbered 95 was levied against him for $74.55; that the call was dated May 2, 1902, and became due June 1, with a grace period expiring June 20; that at the request of the assured the time of payment of this assessment was extended to July 5; that payment was not made and in consequence of the default the certificate was forfeited and that the assured acquiesced in the forfeiture and abandoned his membership and certificate." The reply was a general denial.

343 Plaintiff admits that such assessment was levied; that her husband received notice thereof and that he failed to pay it, but she contends the assessment was illegal; that its non-payment did not work a forfeiture of the policy and that her husband did not acquiesce in the forfeiture nor abandon his insurance. A trial of the issues resulted in a verdict and judgment for plaintiff and the cause is here on the appeal of defendant.

In King v. Insurance Co., 133 Mo. App. 612, we had before us a similar policy issued by defendant and, as in the present case, a forfeiture was claimed on account of the failure of the assured to pay an assessment levied shortly before his death. That assessment, numbered 91, fell due in March, 1901, and the plaintiff met the defense of forfeiture with the claim that the assessment on which it was founded was illegal. She prevailed in the Circuit Court and we affirmed the judgment. The main issues in that case were the same as those now before us, though our concern then was with an assessment levied in March, 1901, and now is with one levied in May, 1902. Now, as then, the validity of the assessment depends on the solution of questions raised by the policy and practices of defendant in relation to the conduct of its business, particularly that part of the business known as the "Safety Fund Department." We find the evidence in the present case differs in some respects from that considered in the King case. Defendant insists these differences distinguish the two cases in all vital particulars and, therefore, that the opinion in the King case should not be accepted as decisive of this case. We shall consider that contention after stating the facts disclosed by the record in hand.

In 1880 defendant, which, prior to that year, had been doing an "old line" insurance business, established its "Safety Fund Depart-

ment" and, thereafter, and until 1899, issued new policies
344 out of no other department. The safety fund business was conducted on an assessment plan but the members—as they were called—were merely policy holders and had no voice in the management of the business. In 1899, defendant discontinued issuing new policies out of this department and returned to "old line" business. It continued the business accumulated in this department but deaths and lapses have reduced the number of members to one-third the number holding policies when the department ceased taking new business. The plan of the Safety Fund Department was as follows:

At the time of the delivery of each certificate of $1,000, the assured paid an admission fee of eight dollars (which went to the soliciting agent as a commission) and a further fee or deposit of $10.00 to be placed in the "Safety Fund." Thereafter he was required to pay expense dues of $3.00 per annum to defray the expenses of conducting the business. Provision was made for the payment of death losses out of a "Mortuary Fund" raised by assessment levied on the policy holders. The Safety and Mortuary funds and the management of them by defendant furnish the field of controversy and the relation of their history and their condition at the time of the levy of assessment No. 113 is necessary to a proper understanding of the questions of law argued by counsel. The foundation of the Safety Fund consisted of the deposits of $10.00 on each certificate of $1,000. As fast as they were received defendant turned such deposits over to the Security Company of Hartford who held and administered the fund thus acquired as trustee under the terms of a trust agreement executed December 31, 1879, by the Security Company and defendant. A copy of this agreement was printed on each certificate issued by defendant. Material provisions thereof are as follows:

"Whereas, The party of the first part (defendant) purposes to issue to persons contracting therefor, Certificates of member-
345 ship in a special department of its business to be known as the Safety Fund Department, and in consideration of the sum of ten dollars to be received on each one thousand dollars of the amount of each and every such certificate for the purpose of creating a Safety Fund, to insert therein sundry agreements with such persons in the following words, to-wit:

"That said Company will deposit said sum of ten dollars, when received, with the Trustee, named in a contract made with it (of which a copy is printed hereon), as a Safety Fund in trust for the uses and purposes expressed in said contract; and shall at the expiration of five years from July 1, 1879, if said Safety Fund shall then amount to three hundred thousand dollars, or whenever thereafter said sum shall be attained, make a semi-annual division of the net interest received therefrom by it, pro rata among all the holders of Certficates in force in said department at such times, who shall have contributed five years prior to the date of any such division their stipulated proportion of said Fund, by applying the same to the payment of their future dues and assessments; and that, whenever said fund shall amount to one million dollars, all subsequent receipts therefor shall be divided by the said Company in like manner as the interest."

"Said Company further agrees that if at any time, after said Fund shall have amounted to three hundred thousand dollars, or after five years from January 1, 1880, if that amount shall not have been attained before that date, it shall fail, by reason of insufficient membership, or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any Certificate issued in said department, and such Certificate shall be presented for payment to said Trustee by the legal holder thereof, accompanied by satisfactory evidence, as hereinafter provided, of its failure to pay, after demand upon it within the time herein stipulated for
346 limitation of action, then it shall be the duty of said Trustee to at once convert said Safety Fund into money and divide the same (less the reasonable charges and expenses for the management and control of said Fund), among all the holders of Certificates then in force in said department, or their legal representatives, in the proportion which the amount of each of their Certificates shall bear to the amount of the whole number of such Certificates in force; and that in such event it shall file with said Trustee a correct list, under oath, of the names, residences and amounts of the Certificates of all members entitled to participate in such division. The evidence referred to above to be either certification by said insurance company's President or Secretary that a claim is justly and legally due and that payment thereof has been demanded and refused, or the duly attested copy of a final judgment obtained thereupon in any court of competent jurisdiction, satisfaction of which has been neglected or refused for the period of sixty days from its date. * * *

"That, as often as the sum composing such Fund shall be in amount sufficient to purchase one thousand dollars, par value, of United States Bonds, said Trustee shall make investments of such funds therein and register the same in its name as Trustee of the Safety Fund of the said Insurance Company, and, provided no default by the party of the first part as hereinbefore recited shall occur, shall accumulate said fund and the income thereof (less the reasonable compensation and expenses), for five years from July 1, 1879, or until such time thereafter as said Fund shall amount to three hundred thousand dollars, par value, of the bonds purchased for said Fund, when the party of the second part will pay over to the party of the first part, semi-annually thereafter, all the further income from said Fund (less the accruing and unpaid compensation and expenses), to be by the party of the first part used for the purposes mentioned in the hereinbefore recited agreements; And, un-
347 less such default shall occur, will thereafter add to the principal of said Fund the deposit thereafter received from the party of the first part, exclusive of the income therefrom, until the whole Fund shall, amount in such bonds, at their par value, to one million dollars; And in the event of the failure or neglect mentioned in the hereinbefore recited agreements, will convert said Fund into money and divide the same in accordance with the hereinbefore recited agreements, as soon as can reasonably be done after the necessary information of the proper persons and their shares shall have

been obtained; Said party of the first part hereby agreeing to put the party of the second part in possession of the information required for the making of a proper division thereof as agreed with its Certificate holders."

The safety fund reached its contractual limit of one million dollars sometime before 1899, and one of the issues contested at the trial and submitted to the jury was whether or not defendant and the trustee had suffered the fund to increase beyond that limit instead of dividing the surplus among the policy holders. On the face of the reports made by defendant to the Insurance Department of this State, it appears that a surplus was being accumulated in the hands of the trustee and, further, it appears that defendant had accumulated and was maintaining a large reserve fund and also was maintaining a standard mortuary fund.

The report filed December 31, 1900, contained the items:

"Net Safety Fund in Security Company of Hartford, Conn.	$1,112,569.14
Reserve on Safety Fund policies	230,220.00
Mortuary Fund held in addition to reserve	111,495.36

The report filed December 31, 1901, which was the last report preceding the alleged lapse of the policy in suit showed $1,166,905.02 in the Safety Fund; $262,257.00 in the "reserve on Safety Fund poiicies" and $116,313.59 in "The Mortuary and other Funds."

348 These reports show that defendant had built up funds which its contracts with policy holders did not authorize, consisting, at the close of business in 1901, of $166,905.02 surplus in the Safety Fund, $262,257,000 in the Reserve Fund, and $116,313.59 in the Mortuary Fund, making a total of $545,475.61. Had the assured, when notified of the call for the 95th assessment, examined this report (and it was open to his examination) he could have reached no other conclusion than that defendant was maintaining and increasing a great reserve fund it had no right to maintain and which greatly exceeded the total of the death losses the 95th assessment was levied to pay.

In other words, the report, which was made under oath and filed in pursuance of the insurance laws of this State, disclosed that the 95th assessment was illegal because it was levied to pay losses which could be paid out of funds in defendant's hands or under its control applicable to the payment of such losses. But it is contended by defendant that its evidence conclusively disproves these solemn statements. It appears from that evidence that there was no surplus in the Safety Fund and that the apparent excess consisted of the Safety Fund in its "Woman's Department," and not of a surplus in the fund belonging to the "Men's Department," and that the item "Reserve in Safety Fund Policies" was not what it purported to be, but referred to a fund applicable to policies of another class. As to the mortuary fund, that evidence shows that it varied and at the time of the call for the 95th assessment was less than $50,000, but it appears beyond question from the testimony of defendant's president

that defendant kept on hand a standing Mortuary Fund out of which it paid losses promptly without waiting to levy an assessment to pay them, and that assessments were levied, not for the payment of unpaid death claims, but to replenish the Mortuary Fund. By
349 this practice, policy holders were assessed to pay anticipated death losses before and not after their occurrence.

Returning to the items of excess in the Safety Fund and Reserve on Safety Fund policies, we hold the evidence of defendant is not conclusive and, to say the least, the verified reports made to the Insurance Department were of sufficient evidentiary potency to raise an issue of fact to go to the jury. On their face these reports are clear and unequivocal. They do not mention a Woman's Department, and they purport to speak of the two funds under consideration only as funds belonging to the department out of which the policy in suit was issued. The statements in those reports are so radically and importantly antagonistic to the evidence adduced by defendant as to preclude the thought that an honest mistake might have been made in them. The only permissible conclusion is that defendant either knowingly misstated vital facts in the reports or has distorted them in its evidence. The jury were entitled to accept the reports as veracious and to reject the contradictory evidence.

Taking up the Mortuary Fund again, we pass to the contention of defendant that its right to maintain a margin in that fund equal to the proceeds of one assessment was adjudicated in a decree entered in the Superior Court of New Haven County, Conn., in the case of Dresser, et al., v. Hartford Life Ins. Co. (the present defendant) and others. That was a suit in equity begun in 1906 by thirty-one certificate holders against defendant, the trustee of the safety fund and certain officers of defendant to obtain an accounting and the appointment of a receiver on the ground of mismanagement and intended misappropriation of funds belonging to policy holders. The lower court sustained the demurrer to the petition and on the
350 appeal of plaintiffs to the Superior Court of Errors, the judgment was reversed and the cause remanded for further proceedings. We quote from the opinion:

"The language of the certificate is that 'if at any time it (the insurance company) shall fail by reason of insufficient membership, or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any certificate, * * * it shall be the duty of said trustee (the security company) to at once convert said safety fund into money, and divide the same * * * among the holders of certificates then in force. * * *' The plaintiffs claim that by this provision there must be such a division of the safety fund among the certificate holders, when their number becomes so reduced that the aggregate amount of their insurance does not exceed $1,000,000, as would be the case when there were but 1,000 holders of certificates at $1,000 each. The claim of the insurance company, as stated in paragraph 29 and admitted by the demurrer, is that, even after the number of certificate holders are so reduced, it may continue to collect dues and to make mortuary assessments, unlimited in the average amount, and unrestricted by the

number of certificate holders and to declare the rights of certificate holders forfeited who fail to pay such dues and assessments. If the insurance company may so continue to levy assessments unlimited in amount, it is difficult to see when there can be a failure to pay certificates by reason of insufficient membership, or how the certificate holders have much protection from the existence of the so-called safety fund. Which of these constructions is the correct one depends upon what is meant by the provision, if the insurance company shall 'fail (to pay the amount of any certificate) by reason of insufficiency of membership.' Clearly by the word 'fail' is not meant a default in any obligation assumed by the insurance company. While the Company undertakes to make the assessments (Lawler v. Murphy, 58 Conn. 295, 20 Atl. 457, 8 L. R. A. 113), and to pay the sum collected, its express agreement is to pay the amount of certificates from 'the mortuary fund and not otherwise.' If, after an assessment for the payment of the amount due upon a certificate is properly made and the assessment paid, the amount realized proves insufficient to pay the indemnity due, the failure is that of the mortuary fund, and not of the insurance company, and there can be no such failure of the mortuary fund, 'by reason of insufficient membership' unless there is a fixed maximum limit of assessment. The certificate fixes such a limit. It provides that the payment of 'mortality calls' to form a 'mortuary fund' for the payment of 'all indemnity matured by the deaths of members' are to be 'levied according to the table of graduated mortality ratios given hereon, and as further determined by their respective ages, and the aggregate indemnity at the dates of such deaths * * *' In the application, which is by its terms made a part of the contract of insurance, each member agrees to pay 'all mortality calls determined as within set forth.' Attached to Exhibit B. is a table showing the method of determining mortuary calls and the ratios graduated according to ages of certificate holders for assessments against each holder of a $1,000
351 certificate, for the collection of a death loss of $1,000. This
method is based upon a minimum outstanding insurance of $1,000,000. There is no other method provided by the contract, and therefore none for the making of mortality calls after the total amount of outstanding insurance falls below $1,000,000. It is expressly stated that these ratios will decrease as the total amount of outstanding insurance increases. There is no suggestion that they can ever be increased. It must be held that they cannot. Even if it is doubtful which of the two claimed constructions of the contract should be adopted, the doubt should be resolved in favor of the insured. Liverpool & L. & G. Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460; Fricke v. U. S. Indemnity Co., 78 Conn. 188, 192, 61 Atl. 431. The demurrer to the first prayer for relief in so far as it applies to that part of the prayer which asks that the certificates be construed as providing that when the amount of the face of outstanding certificates is reduced to $1,000,000 the safety fund is to be distributed among the certificate holders, should have been overruled. Since the contract may be construed as above stated, it should not be reformed as requested."

The case was remanded to the New Haven County Superior Court where a decree was rendered March 23, 1910. The Court found, as we find, that defendant constantly carried a margin or reserve in the Mortuary Fund, and speaking of that practice said:

"The plaintiffs claimed it was improper and wrongful to accumulate these margins and to carry this balance in said mortuary fund, and claimed that said balance of margins should be distributed among the outstanding certificate holders; but it is held that it is proper and reasonable that the company should hold some such fund, for the purpose of enabling it to pay losses promptly, but it is not necessary for that purpose that the company should hold more than the amount of one average quarterly assessment for the previous year. Said fund belongs to the certificate holders and is held in trust for them and the Hartford Life Insurance Company has the right to hold the same to the extent above stated in trust for said certificate holders and for application to the settlement of death claims and said fund should be ultimately distributed in the settlement of death claims as hereinafter provided, before said certificates in accordance with their provisions are extinguished and the safety fund distributed in accord with the judgment of this Court."

It was adjudged that when the amount of the outstanding certificates "falls to the face amount of one million dollars and the Safety Fund is distributed among the holders of said certificates, the balance, if any, of said mortuary fund remaining in the hands of the Hartford Life Insurance Company, shall be distributed pro
352 rata among the certificate holders whose certificates are outstanding at that time."

Defendant argues: "Perhaps it will be urged that this opinion and judgment is no more than persuasive authority. But, if it is only this, surely it ought to persuade. It would be little less than abominable if the Company was controlled as to the management of these funds by divergent view of numerous different courts, for then neither the company, the insured, their lawyer nor the courts could ever possibly tell what were the Company's rights and duties with respect to these funds. On principles of comity, this Court should incline to follow and adopt the rule there laid down. But we submit that the case is something more than merely persuasive authority. It is the opinion, judgment and decree of the Court in which this fund is actually being administered and by the decree of which the defendant is bound, and the defendant being bound thereby, the rights of the beneficiaries of these funds ought not to be determined by a rule variant from that by which the Company is bound to administer the fund. The Mortuary Fund which the defendant has maintained, it has been adjudged right and proper for it to maintain by the courts of Connecticut."

The Superior Court of Errors is a Court of last resort for which we entertain the highest respect and we are willing to accord the decision of that court the same effect that would be given it by that court itself if this case were before it for determination. The two cases are not identical in parties, cause of action or decisive issues. Plaintiff was not a party to that suit; there was no question of the forfeiture of her

rights involved therein, the issues before us were not considered in that case and there is nothing in the opinion from which we quoted to sustain the contention of defendant that it had a right to
353 maintain a surplus in the Mortuary Fund. The New Haven County Superior Court is not a court of last resort and its decrees are no more persuasive than would be the decree of a trial court in this State.

Plaintiff stands on entirely different ground from that occupied by the plaintiffs in the Dresser case. This is an action at law and defendant is standing on a forfeiture alleged to have occurred automatically by Johnson's failure to pay an assessment. The law abhors forfeitures and courts will indulge in no presumption to aid them. Under the admission that Johnson was a certificate holder in good standing upto the time he defaulted in thepaymentof the 95th assessment, the burden was on defendant to show affirmatively the existence of the facts on which it predicated its right to declare a forfeiture. No presumption of right acting in the levy will be entertained but, on the contrary, defendant will be held to prove that the assessment was necessary, was not excessive and was levied in the manner prescribed in the contract. (Earney v. Modern Woodmen, 79 Mo. App. 385; Agnew v. A. O. U. W. 17 Mo. App. 254; Puschman v. Ins. Co. 92 Mo. App. 640; Hannum v. Waddill, 135 Mo. 153; Stewart v. A. O. U. W. 46 S. W. 579 (Tenn.) 2 Bacon on Benefit Soc. (3rd Ed.) sec. 377. A certificate holder in an assessment company cannot be put in the wrong and subjected to the penalty of forfeiture until he neglects or rejects a lawful demand. If the assessment in question was illegal, defendant was without legal justification in refusing to pay the loss.

Defendant argues it was necessary to maintain a margin in the mortuary fund in order that losses might be paid promptly. That argument might have weight but for two facts: First: The contract with policy holders expressly provided that assessments for the mortuary fund should be levied only for the payment of losses already matured by death and, in effect, forbade the maintenance of a reserve in that fund, and, Second, there was no business reason
354 to serve by anticipating the regular method prescribed in the contracts for the payment of the death losses for the reason that the department was not taking new business and continuing members could not complain as long as defendant was observing the terms of their contracts. Doubtless it would be reasonable for a going assessment company to provide in its contracts with members for the maintenance of a reserve in the Mortuary Fund to pay death losses promptly, but it is indefensible for a Company retired from active business to levy assessments for such purpose in violation of the terms of its contracts with members."

It matters not how reasonable it might have been to keep on hand a surplus fund. The contract did not permit it and in declaring a forfeiture defendant elected to stand on the strict letter of the contract and will not be heard to complain of the unreasonableness of its terms. We conclude that the jury were entitled to find from the evi-

dence that the assessment in question was illegally levied and that defendant had on hand in the Safety, Reserve and Mortuary funds a sufficient fund for the payment of all accrued death claims.

The defense of abandonment we find is not well founded. Johnson did ask for an extension of time which was granted. After the expiration of that period he had no further communication with defendant and his silence cannot be tortured into acquiescence in the forfeiture. He had no voice in the affairs of the Company and, therefore, was not required to protest or appeal to defendant for redress. Nor was it required of him to make a tender of subsequent assessments, if any, that were lawfully levied, for that would have been a vain and useless formality. In the case of Wayland v. Insurance Company, decided at this term, we considered at length the subject of abandonment in such cases and refer to our opinion in that case for a full discussion of the subject.

In conclusion we reaffirm our decision in the King case and apply it here as far as it may be applicable to the present facts.

355 The judgment is affirmed.

All concur.

Broaddus, P. J., concurs; Ellison, J., dissents in separate opinion.

J. M. JOHNSON.

356 No. 9402.

NANNIE M. JOHNSON, Respondent,

v.

HARTFORD LIFE INSURANCE CO., Appellant.

The following was prepared as the opinion of the court but my associates not being satisfied therewith, prepared, in opposition thereto, that part of the opinion on the subject of abandonment in Wayland v. Western Life Indemnity Co., and rest their decision in this case on what was said by them in that case.

This action is based on a certificate of membership and life insurance in an assessment company, issued to James T. Johnson on the first of November, 1888, for the sum of five thousand dollars, payable to his wife out of a mortuary fund made up by assessment of members. Johnson dies on the 15th day of January, 1907. After issuing the certificate, the company changed its name to that of Hartford Life Insurance Company, by which it is sued. The company refusing to pay the amount of the insurance, this action was instituted by the widow. The company claims that Johnson failed to pay an assessment due in June, 1902, and thereby and by force of the express provisions of the contract, his insurance ceased at that time. It likewise claims that Johnson abandoned the contract and acquiesced in its termination. The widow claims that there was an express surplus in the mortuary fund and that the assessment was unnecessary, unauthorized and void, and that a forfeiture could not follow its nonpayment. A *preemptory* instruction to find for defendant was refused and judgment rendered for plaintiff.

357 The certificate of insurance was issued in consideration of Johnson paying certain annual dues and all mortality assessments for the maintenance of a mortuary fund, and dues for the creation of a safety fund. The payment of mortality calls, or assessments, were to be made quarterly, on the first days of March, June, September and December of each year. Thirty days' notice of each assessment was to be given the assured and it was agreed that the certificate was issued on "the express condition that if either the annual dues, mortality calls, or safety fund deposit, are not paid to said company on the day due, then this certificate shall be null and void and of no effect and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force, either from the company or the Trustee of the Safety Fund. And a failure to make the stipulated payments shall absolutely terminate the member's liability therefor."

There were also stipulations contemplating applications for reinstatement by the member who had lapsed.

It was further stipulated that the following part of the application was made a part of the contract: "If I or my representatives shall omit or neglect to make any payment as required, in respect of amount, place and time of payment, by the condition of such certificate, then the certificate to be issued hereon shall be null and void, and all money paid thereon shall be forfeited to said company."

Johnson paid his dues and all quarterly assessments from his entrance as a member in 1888, until that due the first day of June, 1902, a period of nearly 14 years. He received proper notice of the June assessment of $74.55, but failed to pay. But it appears that the notice sent to Johnson complying with the contract in
358 that respect, had a statement at the close thereof that if payment of the assessment due the first of June was not received at the home office by the 5th of June, a second notice would be sent by registered letter, giving until June 20th, to make the payment. It is then stated: "After June 20th, the limit allowed for payment under the registered notice, the company reserves the right to require a medical examination as a condition of reinstatement." This second notice was sent to Johnson giving him until the 20th of June. He paid no attention to it until the 19th, one day before the limit would expire and too late to get the payment to the home office in time. Then his son Garland wrote the following letter (which he afterwards approved) to the company: "My father and I both have been out of town and did not get to attend to payment due on policy 109854, Hartford Life & Annuity Insurance Co., on life of Jas. T. Johnson. I see our time expires tomorrow. What steps can we take now to make payment and have it reinstated? Father is in perfect health. I am very sorry indeed for the delay but it could not possibly be avoided. Kindly let us know by return mail."

In due course, June 24th, the company answered this letter, again extending the time, until July 5th. It reads: "As you wrote us before the last day of grace expired for payment of the June call, policy No. 109854, we are warranted in extending the time of pay-

ment, and have given you until July 5th to renew the policy. If, therefore, you wish to remit us $75.55 on or before that date, the policy will be kept in force."

But again Johnson failed to pay and neither he nor the company had any further correspondence. Relations between them there ended and nothing connected therewith transpired until sub-
359 sequent to his death, nearly five years thereafter. He had been in regular receipt of semi-annual dividends on his certificate down to three months before his default. Though payment of dividends to him thereafter ceased and though no further assessments were ever made against him, he never uttered a complaint nor gave a sign that he considered himself any longer a member of the company, or connected with it, contractually or otherwise. Is it not manifest to any reasonable man that Johnson considered his connection with the company had ceased? He knew (his contract so informed him) that the whole scheme of insurance which he had been enjoying for fourteen years by paying each year his quarterly assessment, was based upon assessments of members scattered throughout the country; that each one's security—the payment of the insurance to each one's beneficiary—depended upon the payment by the others of their assessments. And he must necessarily have regarded his ceasing to pay, as ending his connection with the company. And such is the law; it is the law even though the assessment which was not paid was not authorized by the contract, for that cannot control the effect of an abandonment: Mutual Life Ins. Co. v. Hill, 193 U. S. 551; Mutual Life Ins. Co. v. Phinney, 178 U. S. 328; Mutual Life Ins. Co. v. Sears, 178 U. S. 345; Ryan v. Mutual Reserve Fund 96 Fed. 796; Smith v. New England Mut. L. Ins. Co., 63 Fed. 769; McDonald v. Grand Lodge, 21 Ky. Law, 883; Lone v. Mutual Life Ins. Co. 33 Wash. 577. In the cases cited from the Supreme Court of the United States the opinions are by Justice Brewer. In the first of these, according to the statement of facts, at page 551; the assured took out insurance and paid one premium. Notice of the second one was given, but he failed to pay. He was not asked, nor did he pay any succeeding premiums for four years, when he died. The plaintiff in that case relied upon the fact that no notice of forfeiture
360 was given. On the other hand, "the defendant relied upon the non-payment of the premium other than the first, and an abandonment of the contract." The defendant was a resident corporation of the State of New York, while the assured resided in the State of Washington and took his insurance there. The laws of the State of New York required a notice of forfeiture to be given the assured before one could be effected. The Court held that even though the New York law applied and a forfeiture could not be taken without giving notice to that effect; yet the assured had abandoned the contract by his continued failure to pay the annual premiums. At page 559 of the report, it is said that: "Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defenses to avoid payment, and in like manner should they set their faces against an effort to exact

payment from an insurance company when the premiums have deliberately been left unpaid." The Court then cites and approves Lone v. Ins. Co., supra.

In the latter case the assured paid one premium and lived twelve years without paying any more, and, as in the former, his representatives contended that thirty days' notice of forfeiture should have been given as required by the New York statute. The Court held that though that were true, yet the assured had acquiesced in the company's position, paid no further premiums and could not recover. In the course of the opinion it is said that: "We are satisfied that the thought never occurred to Rex (the assured) during his life time that he had a claim against the company on the policy which had been issued so many years before, or, if he did, after the lapse of any appreciable time, it was a dishonest thought, for he knew that he had not performed the duties which devolved upon him under
361 the contract, and that he had no rights thereunder; and there seems to be no just reason why his administrator should demand rights which he had virtually waived."

In McDonald v. Grand Lodge, supra, an assessment company in 1882, issued a certificate of insurance on the life of McDonald, payable to his wife as beneficiary. In January, 1886, he surreptitiously left home and his wife paid the assessments called for between January and Octcber. But at the latter month the company refused to receive future assessments and notified her of his suspension and failed to notify her of any subsequent assessments. Nine years thereafter McDonald died and the beneficiary brought an action on the certificate. The court held that having acquiesced in the suspension, without further effort, for nine years, the claim could not be asserted.

In Mutual Life Ins. Co. v. Phinney, supra, the assured paid the first year's premium and failed to pay for two years, when he died. A short time before the second premium became due, he said he could not pay and asked the agent if he would take his note for it. This was refused. Four weeks afterwards and after the premium was due, he informed the agent that he had the money and could pay. The agent informed him that now he would have to get a certificate of health. The assured said he could not, as he had been rejected by another company. A few moments afterwards the agent requested the assured to let him have the policy to use in canvassing. The assured, remarking that it had lapsed, gave it to him. The assured died in less than two years and it was held that he had abandoned the contract.

362 In Smith v. New England Mut. L. Ins. Co., supra, the policy was dated May 24th, 1890, and the assured paid the two first annual premiums. The question was whether he paid the third, due in 1892, or was excused from doing it. He dies November 22nd, 1893. The company treated him as in default for failure to pay and refused a subsequent offer to pay, because, as it claimed, the policy had lapsed. Nothing further transpired, and he died in less than two years. His widow was allowed to recover the paid up value of the policy under the provisions of a statute, but was denied

the right to a judgment for the amount insured, on the ground of his acquiescence in the lapsing of the policy. The court said: "The assured acquiesced in the company's position—that his policy had lapsed—and accordingly neither paid nor tendered subsequent premiums, but treated the policy as a security simply for the interest acquired under the statute. Had his life been continued the claim now made would never have been urged or thought of; his early death alone suggested it. Had he lived ten years longer without payment or tender, this claim would then have been as reasonable as it is now."

In Ryan v. Mutual Reserve Fund, supra, the assured took out a benefit certificate in 1886 and paid his assessments until February 1898. On the 26th of March 1898, he wrote the company he would not pay that assessment because of its increased amount, and would "quit." In less than six months thereafter he died. The court held that notwithstanding the company had no right to increase the assessment, yet he abandoned the contract instead of contesting the assessment. That there were two modes of action open to him, to contest the assessment he considered to be illegal and unjust or to abandon the contract, and that he chose the latter. The court in this connection, said, "The case is not one where the company is seeking, after the death of the insured party to establish a
363 right to declare the contract of insurance forfeited by reason
of a failure to meet some of its requirements; but the question is whether the insured did not, during his life time, affirmatively put an end to the contract, so that it had, by his action, been terminated before his death."

The question has arisen in the courts of this State and has been answered in harmony with the foregoing cases; Glardon v. Supreme Lodge K. of P. 50 Mo. App. 45; Miller v. Grand Lodge, 72 Mo. App. 499; Lavin v. Grand Lodge, A. O. U. W. 112 Mo. App. 1; Bange v. Supreme Council Legion of Honor, 128 Mo. App. 461; McGeehan v. Ins. Co. 131 Mo. App. 417. In the first of these there was a void expulsion and forfeiture. The member failed to pay an assessment of July 1st, 1882, and died in less than two years. In his life time he made no objection and took no steps questioning the act, and it was held that he acquiesced and the beneficiary could not recover. It was stated in the opinion (page 57 of the report) that an expelled member owed a duty to his fellow members to at least make known his objection to the measures taken against him. That the rights of a member are only contractual rights and his being illegally cut off from membership is no more than a breach of contract which the member may, at his election, affirm or disaffirm. It was stated (pp. 58, 59) that a member cannot rest indefinitely under his illegal treatment without making protest, and if he does, he disables his beneficiaries to deny acquiescence and recover against the Company a sum the paying members must satisfy. It was also said (p. 59) that certificates of insurance, like in that case, involved a scheme of mutual insurance (and so does the case in this controversy) under which the living members contribute a certain sum to make up a

fund for the benefit of the widow and children, or other beneficiary, of a deceased brother. The Court, speaking through Judge
364 Thompson, said (p. 59) that: "There is an obvious injustice in requiring them to make contribution to pay such a benefit to the family of a deceased member, who has for a long time ceased himself to make any contribution on his part; and that is so, although he may have ceased in consequence of a void suspension or expulsion, which he has taken no steps to resist or disaffirm, but in which he has passively acquiesced. We take the just rule to be that, even in the case of a void expulsion or suspension, the expelled or suspended member is under a duty to his co-contributors to affirm or disaffirm the act of expulsion or suspension within a reasonable time, and in some distinct manner under the circumstances; and that where he takes no steps of any kind to secure his reinstatement, allows dues which had accrued and were payable prior to the date of his expulsion to remain unpaid, and neither tenders such dues nor any subsequently accruing dues, he must be taken to have acquiesced in and consented to the sentence of expulsion or suspension."

In the second of the last cited cases the same rule is stated by Judge Bond.

In the third of the last cited cases, Judge Goode, writing the opinion for the St. Louis Court of Appeals, approved of the cases to which we have just referred. The facts were that a member took his certificate of insurance in 1899. He failed to pay the assessment for September, 1900, and died in about ten months thereafter. He was suspended upon his failure to pay, and to the day of his death did not pay, nor offer to pay, any monthly assessments; nor did he take any steps to question his suspension or to show his dissatisfaction therewith. It was said (p. 14) that it was incumbent "on a member of a benefit society, when unlawfully suspended or expelled, to act thereafter as a member, if he wished to enjoy the rights and privileges of one; that he might not behave as though the rules of
365 the order were no longer binding on him, perform none of his duties, pay none of his dues and assessments, and still retain the same privileges and benefits he would enjoy if he was carrying his share of the society's burdens. A suspended member must either acquiesce in his suspension or protest against it—must keep his insurance cum onera. If he does not protest formally and by words, he must treat his membership as still subsisting, not alone for the purpose of giving rights, but for the purpose, as well, of imposing burdens. He cannot elect to regard it as at an end, so far as the obligation to pay dues and assessments and comply with the other rules of the order is concerned, but in existence as far as his certificate of insurance is concerned. He must treat himself as in the Order for all purposes or as out of it."

In the fourth case the rule was again stated by the St. Louis Court of Appeals in the following language, at page 475 of the report: "It is the doctrine of this court, as well as of the tribunals of other jurisdictions, that by remaining silent after he is notified of a void expulsion or suspension, a member of a fraternal society will forfeit

his rights in the society, including his insurance. This is because the existence of such associations depends on the prompt payment of dues, and they would be destroyed if members were allowed, after a suspension technically invalid, to retain their insurance without paying assessments. As has been pointed out in other opinions such a rule would put a suspended member on a better footing than an active one, because the former would continue to enjoy his insurance without paying for it; whereas the latter would pay. Bange died in March, 1905, four or five months after his suspension and seven months after he had paid any dues. If he received notice of the action of the council and did nothing in the premises, nor treated himself as a member of the order and bound to contribute to its burdens no recovery can be had on his benefit certificate."

366 The last of these cases arose in this court. It there appears that the assured had a New York policy of insurance issued to him in that State while he was a resident thereof, on which he paid premiums from 1883 to 1895, when he ceased further payments for a period of eight years. It was the law of New York that there could not be a forfeiture of a policy without first giving thirty days' notice of the intended forfeiture, and as this was not done it was contended that the policy was a subsisting obligation and that the assured was entitled to the amount insured less the premiums he had not paid. But it was held that notwithstanding the provision as to forfeiture, the fact that the assured ceased to pay premiums for a period of eight years, showed an abandonment. We said that: "It must be conceded that so far as plaintiff's rights are concerned he was at liberty to abandon and rescind the contract. He did not merely neglect a single payment of premium, nor several, but he abandoned all pretense of recognition of the contract for a long series of years. There is no law, nor policy to prevent him, defendant consenting thereto, from giving up his contract."

Furthermore, the propriety and justness of the rule, thus repeatedly announced, having recently received the endorsement of the Supreme Court of this State, is not open for further discussion: Konta v. St. Louis Stock Exchange, 189 Mo. 26. That case involved the right of membership of one claiming to be a member of a stock exchange, whose place had been forfeited and he expelled for alleged non-payment of dues. At page 39 of the report the Court said: "But even assuming, as contended by plaintiff, that Mr. Konta was a member of the St. Louis Stock Exchange, and that his expulsion was undoubtedly illegal, as it certainly was if he was ever a member of the exchange, he was bound, within a reasonable time after obtaining knowledge of such expulsion, to assert his rights;
367 otherwise he will be deemed to have consented to such expulsion, however, illegal or irregular it may have been."

The Court then proceeded to approve Glardon v. Supreme Lodge Knights of Pythias, supra, and then added that:

"In this case plaintiff ascertained through his agent, Mr. Ten Broek, in April or May, 1901, that he had been expelled from the St. Louis Stock Exchange for non-payment of dues. He had allowed

dues to accrue which were payable on January 1, 1900, July 1, 1900 and January 1, 1901. He has at no time tendered these dues, nor any dues which accrued subsequently and prior to the institution of this suit, to-wit, dues payable July 1, 1901, and January, 1902. Nor did he take any steps whatever to set aside his alleged illegal expulsion until June 9, 1902."

Let it be conceded that an assessment insurance company conducts its business by irregular and illegal methods, and in addition to that, illegally suspends a member and forfeits or terminates his policy.—Does it follow that the member is to receive free insurance during his life? If the insurance on the life of a man is wrongfully terminated by the company when he is twenty-five years old, and he lives to the age of seventy-five, may he pay no more and, without protest, sit idly by during the intervening fifty years, insured all the while, and leave a live policy at his death? If he may for five years, as in this case, he may for fifty, as in the supposed case. New members come into these associations and old ones go out by death, lapse, etc. The new ones come in on the faith of the liabilities and present business appearance of the company. Can a member be permitted to allow the termination of his policy to continue without protest, or objection in any form, thereby inducing persons to become members on the faith that he has no prospective claim on the company, and yet his representatives, years afterwards, compel these members to pay the policy the same as if nothing had occurred? The deceased
368 was a physician—a man of intelligence—he knew the basis upon which the Company was founded, its mode of insurance and manner of collecting funds to pay death losses. He knew that he was dropped from membership by the Company, and never asked for reinstatement. It was his duty to act in accord with the natural thought and bent of any reasonable man, and have taken some step in opposition to this action, if he meant to look upon the insurance as a subsisting contract. Not having done so, it is inconceivable that he considered himself connected with the Company at the time of his death.

Plaintiff has found no way to meet the foregoing suggestions except by the bare assertion that Doctor Johnson had a right to remain passive, and, further, that acquiescence or abandonment was not pleaded and that no instructions were asked on that head. We have already shown that, in the circumstances here involved, passivity is acquiescence. The answer of defendant does especially plead the acquiescence of Johnson for five years up to his death. There was no dispute in the evidence on this point and the defendant asked the only instruction it could ask consistently with the law as we have stated it, and that was a peremptory direction to the jury that plaintiff had not made a case on the evidence and could not recover. This the court refused, and, I think, erred in so doing.

I deem the decision of the majority in conflict with Konta v. St. Louis Stock Exchange, 189 Mo. 26, and the following decisions of the St. Louis Court of Appeals: Glardon v. Supreme Lodge K. of P. 50 Mo. App. 45; Miller v. Grand Lodge, 72 Mo. App. 499; Lavin v. Grand Lodge A. O. U. W. 112 Mo. App. 1; Bange v. Supreme Council

Legion of Honor, 128 Mo. App. 461. The case should, therefore, be transferred to the Supreme Court for final determination.

JAMES ELLISON.

369 And on the 20th day of April, 1915, there was filed in the Clerk's office at said Supreme Court a suggestion of the death of Respondent, in the words and figures following, to-wit:

In the Supreme Court of Missouri, April Term, 1915.

No. 17399.

NANNIE M. JOHNSON, Respondent,

vs.

HARTFORD LIFE INSURANCE COMPANY, Appellant.

The undersigned, Peyton A. Parks, respectfully suggests to the court that Nannie M. Johnson, the respondent herein, has departed this life without a will and that no administrator of her estate has been appointed. Affiant further suggests that as soon as it may be done, an administrator will be appointed of the estate of Nannie M. Johnson and the cause revived in the name of such administrator. He therefore suggests that the cause be continued until the next term of this court.

(Sgd.) PEYTON A. PARKS.

Subscribed and sworn to before me this 16th, day of April, 1915.

(Sgd.) MYRTLE DE WITT,

[NOTARY SEAL.] *Notary Public.*

Service of the foregoing is hereby acknowledged.

(Sgd.) WASH ADAMS,

Attorney for Appellant.

Endorsed: Filed April 20th, 1915. J. D. Allen, clerk.

And on the 21st day of April, 1915, there appears in the record of said Court an order upon said suggestion of death in said cause in the words and figures following, to-wit:

17399.

NANNIE M. JOHNSON, Respondent,

vs.

HARTFORD LIFE INSURANCE CO., Appellant.

370 Now at this day the death of Nannie M. Johnson, Respondent herein, having been suggested to the Court, and not denied, leave is by the Court granted to the parties to revive this

cause as to the said Nannie M. Johnson, in the name of her administrator when such administrator is appointed; and the court doth order that said cause be continued to the October Term, 1915.

And on the 24th day of April 1916, there appears in the record of said Supreme Court an order of submission of said cause, in the words and figures following, to-wit:

17399.

NANNIE M. JOHNSON, Respondent,

vs.

HARTFORD LIFE INSURANCE CO., Appellant.

Come now the said parties, by Attorneys, and after arguments herein submit this cause to the court.

And on the 29th day of May, 1917, there appears in the record of said Supreme Court a judgment in said cause in the words and figures following to-wit:

In the Supreme Court of Missouri, April Term, 1917.

NANNIE M. JOHNSON, Respondent,

vs.

HARTFORD LIFE INSURANCE COMPANY, Appellant.

Appeal from the Circuit Court of Henry County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Henry County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant her costs and charges herein expended and have therefor execution. (Opinion filed.)

371 That on the 29th day of May, 1917, there was filed in said cause an opinion by the Supreme Court of the State of Missouri, in the words and figures following, to-wit:

372 In the Supreme Court of the State of Missouri, April Term, 1917, Division Two.

No. 17399.

Nannie M. Johnson, Respondent,

vs.

Hartford Insurance Company, Appellant.

This is an action upon a policy of life insurance issued by the defendant company, on November 1, 1888, to James T. Johnson, in the sum of five thousand dollars, payable, upon the death of the assured, to Nannie M. Johnson, the named beneficiary therein. The defendant company seeks to avoid payment of the policy on the ground that the policy became forfeited because the assured failed to pay a premium assessment thereon. Trial was had in the Circuit Court of Henry County, before a jury, resulting in a verdict and judgment in favor of the plaintiff for the full amount of the policy, plus interest, which amounted to the total sum of $5,556.66. Thereupon the defendant company duly appealed to the Kansas City Court of Appeals, which court, (166 Mo. Appeal, 261), affirmed the judgment. The case was certified here by the Kansas City Court of Appeals on the ground that the majority opinion of that court was in conflict with certain decisions of the St. Louis Court of Appeals.

By the pleadings it stands admitted that defendant was a corporation and that it had issued the insurance policy upon which this suit was founded; that the assured died on the 15th day of February, 1907 and that plaintiff is the named beneficiary in said policy and since the death of the assured has complied with all of the requirements of said policy. It was further admitted that plaintiff
373 had made demand for the payment of the policy which had been refused.

The evidence upon the part of the plaintiff was substantially as follows: The policy contract was introduced in evidence. Portions of the contract necessary to an understanding of the issues are as follows:

"In consideration of the representations, agreements, and warranties made in the application herefor, and of the Admission Fee paid; and of Three Dollars per annum on each $1,000 of the Indemnity herein provided for, for expense Dues, to be paid as hereinafter conditioned, and of the further payment of all Mortality Calls proportioned to the said Indemnity, levied against the herein named member to form a Mortuary Fund for the payment of all Indemnity matured by deaths of members, and to create a Safety Fund as hereinafter described, which mortality calls, to be levied upon all the members in the department wherein this Certificate is issued whose Certificates are in force at the dates of such deaths, shall be made according to the table of graduated mortality ratios given hereon,

and as further determined by their respective ages and the aggregate indemnity at the dates of such deaths, with due allowance for discontinuance of membership (one-third of the proceeds of such mortality calls to be applied towards said Safety Fund until the sum of ten dollars on each $1,000 Indemnity aforesaid shall have been thus applied, when the basis of all subsequent mortality calls shall be two-thirds only of the table given hereon), does hereby issue this Certificate of Membership in its Safety Fund Department to James T. Johnson (herein called the member), of Clinton, County of Henry, State of Missouri, with the following agreements:

That ninety days from the receipt by the President or Secretary of said Company of satisfactory proofs, in accordance with forms furnished upon notice of death and with full information as to the manner and cause of the death of the herein named member while this Certificate is in force, all of the conditions hereof having been conformed to by the member, upon presentation and surrender of this Certificate properly receipted, there shall be due and payable, out of the aforesaid Mortuary Fund and not otherwise, the Indemnity of Five Thousand Dollars (less the balance unpaid, if any, of the stipulated contribution to said Safety Fund, with fifty per cent added, together with the unpaid installments of annual expense dues and any mortality or other charge against the member, payment of which is not matured) to his wife, Nannie M. Johnson, if living; otherwise to his legal representatives. All such payments to be made at the Home Office of said Company in lawful money of the United States.

That said Company will deposit said sum of Ten Dollars, when received, with the Trustee, named in a contract made with it (of which a copy is printed hereon), as a Safety Fund in trust for the uses and purposes expressed in said contract; and shall make a semi-annual division of the net interest received therefrom by it,
374 pro rata among all the holders of Certificates in force in said
Department at such times, who shall have contributed five years prior to the date of any such division their stipulated proportion of said Fund, by applying the same to the payment of their future dues and assessments; and that, whenever said Fund shall amount to One Million Dollars, all subsequent receipts therefor shall be divided by the said Company in like manner as the interest."

The policy also provided that upon a failure to pay the annual dues, mortality calls and safety fund deposit as required by the contract, the policy should become null and void and of no effect. Plaintiff introduced in evidence that portion of the annual statements of the defendant company made to the Insurance Department of the State of Missouri, showing the condition of the safety fund department for the years ending December 31, 1900, 1901, 1902, 1903, 1904, 1905 and 1906. The report for the year ending December 31, 1900 showed the following items:

"Net safety funds in Security Company of Hartford, Conn.	1,112,569.14
Reserve on safety fund policies	230,220.00
Mortuary fund held in addition to reserve	111,495.36
Premiums in course of collection, safety fund department	349,000.00"

The report for the year ending Dec. 31, 1901 contained the following items:

"Net safety funds in security company	1,166,905.02
Reserve on safety fund policies	262,257.00
Mortuary and other funds in addition to reserve	116,313.59
Premiums in course of collection, safety fund department	358,300.00"

The report for the year ending December 31, 1902, shows the following items:

"Net safety funds	$1,176,561.25
Special reserve and surplus on safety fund policies	352,640.92
Premiums in course of collection, safety fund department	198,250.00"

The evidence upon the part of the defendant was in deposi-
375 tion form and consisted largely of the deposition of George E. Keeney, President of the defendant company.

The charter of the defendant company was introduced in evidence showing that it was chartered to do a life insurance business by the legislature of the state of Connecticut. The by-laws of the company which were introduced in evidence provided that the Board of Directors "shall have full power to exercise the corporate powers conferred upon the company by its charter and any amendments thereof excepting as shall be otherwise determined by the by laws or resolutions of the company," and further provided that three directors "shall constitute a quorum for transacting the ordinary business of the corporation."

The defendant company, from the date of its organization until 1880, issued what is known as the legal reserve or old line insurance policies. From 1880 to 1899, it issued the safety fund or assessment form policies. This is the form of policy involved in this suit. In 1899 it ceased doing the assessment or safety fund business and again began doing the old line or legal reserve business.

From the date of the issue of the policy in this case up until the assessment due June 1, 1902, the assured paid all dues and assessment calls made against this policy. Call No. 95 which was not paid by the assured and upon which defendant bases its forfeiture was laid or assessed as of date April 1, 1902 and was due and payable June 1, 1902. The amount stated in the call as due upon Dr. Johnson's policy was $74.55. This call was mailed to Dr. Johnson May 2, 1902. It states that the call is due June 1, 1902 and that it is made to meet one hundred and thirty-seven deaths, amounting to $369,859.00. A list of the one hundred and thirty-seven

376 deaths accompanied the call. On June 10th a second notice was mailed by the defendant company to Dr. Johnson, calling his attention to the fact that the quarterly call No. 95 had not been paid by him and stating further that unless the amount of the call plus fifty cents for the additional notice should be received at the home company on or before June 20, 1902, that the policy should be cancelled. On June 19, 1902, Garland S. Johnson, son of the assured, wrote defendant company the following letter:

"Schell City, Mo., June 19, 1902.

Hartford Life Ins. Co., Hartford, Conn.

GENTLEMEN: My father and I both have been out of town and did not get to attend to payment due on policy 109854, Hartford Life & Annuity Insurance Co., on life of Jas. T. Johnson. I see our time expires tomorrow. What steps can we take now to make payment and have it reinstated. Father is in perfect health. I am very sorry indeed for the delay, but it could not possibly be avoided. Kindly let us know by return mail.

Yours very truly,

GAPLAND S. JOHNSON."

On June 24, 1902, the defendant company replied to said letter as follows:

"June 24, 1902.

Garland S. Johnson, Schell City, Mo.

DEAR SIR: As you wrote us before the last day of grace expired for payment of the June call, policy No. 109854 we are warranted in extending the time of payment, and have given you until July 5th to renew the policy. If, therefore, you wish to remit us $75.05 on or before that date, the policy will be kept in force.

Yours truly,

E. A. WRIGHT,
Chief Clerk."

Call No. 95 was never paid by the assured or by any one for him and it appears that no further communication was had between the defendant company and the assured thereafter.

Garland S. Wilson was called to testify in the case by the
377 defendant and, upon direct examination, testified that he wrote the above mentioned letter to the defendant company without any authority from his father, the assured, and that his father didn't know anything about it until he received the above reply and that his father then said that "he would tend to it." On cross examination this witness testified that at that time he knew nothing about the company's mortuary fund, reserve fund or safety fund.

The evidence upon the part of the defendant attempts to explain the annual report made by it to the insurance department of the state of Missouri, by stating that the company carried two safety

funds, one known as the men's department safety fund and one known as the women's department safety fund; that in truth and fact these two funds were levied separately and kept separately by the security company, under two separate contracts, and that the two funds were erroneously added together and appear as one fund in the annual reports. The evidence upon the part of the defendant further tended to show that the men's department safety fund attained the sum of one million dollars on December 31, 1893, and that ever since that date all interest thereon, together with dues thereto were turned over by the security company to the defendant company and by it distributed to its policy holders, under the terms of its policy contracts; that on April 30, 1902, the book value of the men's safety fund was $1,056,354.04, but that the par value was only one million dollars; and that on June 1st of the same year the book value of the men's safety fund was $1,056,654.04 and the par value thereof was $1,000,000.00.

It further appears that the average death loss per month was about
$100,000.00. The President of the company described the
378 different items going into the assessment call No. 95. It ap-
pears that the lapses were estimated at five per cent, and later
turned out to be 3.52%. Call No. 95 was assessed by the president and secretary of the company or by the vice-president and secretary of the company or by the vice-president and some one acting for the secretary; that the practice of the company in levying calls for assessment was not only for the purpose of paying existing death losses but also for paying anticipated death losses occurring before the next call; that call No. 95, together with the mortuary funds on hand, had not only to provide for existing death losses but also all anticipated death losses that would occur before September 1, 1902; that the death losses were not paid from any particular call but were paid from the mortuary fund and the mortuary fund was in turn replenished by the quarterly calls, and that death losses were frequently paid from the mortuary fund before an assessment was made to pay that particular loss; that all death losses were included in some assessment and the receipts from all assessments were paid into the mortuary fund, from which fund death losses were paid; that this was done as a matter of convenience, so that death losses might be paid within ninety days from the date of proof.

The trust agreement between the defendant insurance company and the security company, a copy of which agreement was attached to the policy in question, required the security company to invest said trust fund in United States bonds "until the whole fund shall amount in such bonds at their par value to $1,000,000." It appears that after the policy in question was issued the legislature of Con-
necticut passed an act in 1889 authorizing the defendant in-
379 surance company to invest its safety fund in securities other
than United States bonds and thereafter a large portion of
the safety fund was invested in railroad and municipal bonds. This possibly explains the two items "book value" and "par value" of the safety fund.

Dr. Johnson, the assured, was a member of the safety fund department but the defendant company is a stock company and he had no right to participate in the management of the company.

The defendant offered a demurrer to the evidence which was overruled.

Plaintiff's instructions numbered 1, 2 and 3, given by the court, which are claimed to be erroneous by defendant are as follows:

No. 1. "The Court instructs the jury that if you find from the evidence that at the time the defendant notified the deceased Johnson that his premium was due, and which defendant claims he failed to pay, there was a sum of money in excess of $1,000,000 in the Safety Fund mentioned in the contract, and a surplus in the Mortuary Fund mentioned in the evidence, then it was the duty of defendant to have applied such excess to the payment of premiums of policyholders; and if you find from the evidence that said Johnson's share in such excess, if any, was sufficient to pay the amount of premium due at the time said notice was given to him, then defendant could not declare said insurance forfeited for the failure to pay said premium."

No. 2. "The Court instructs the jury that it devolves upon the defendant to prove that it was necessary, at the time it claims an assessment was made, for failure to pay which it claims the insurance was forfeited, to make an assessment, and that an assessment was made by the directors of defendant, and that said assessment was not for a larger amount than was necessary to pay the death losses which had accrued up to that time, after giving said Johnson credit for his pro rata share of the excess in the Safety Fund over $1,000,000 if you find there was such excess, and in the mortuary Fund, if you find there was excess in that fund, and unless defendant has so proven, it can not declare said insurance forfeited."

No. 3. "The Court instructs the jury that if you find from the evidence there was on hand in said Safety Fund a sum in excess of $1,000,000, and if you find also there was in the hands of de-
380 fendant a Mortuary Fund, which had been collected from
previous assessment, then it was the duty of defendant to have applied such excess in said Safety Fund and said Mortuary Fund to the payment of death claims which had matured prior to the time the notice was given to Johnson that his premium was due, for failure to pay which defendant claims said insurance was forfeited, and if defendant failed to so apply said money, then it can not claim that the insurance is forfeited."

It appears that defendant asked only one general instruction and that was to the effect that there was no evidence showing vexatious refusal to pay the amount of the policy. This instruction was given. Defendant seeks a reversal of the judgment on the ground that instructions numbered 1, 2 and 3 were erroneous and on the further ground that the assured had abandoned the policy.

Opinion.

I.

It is contended that instructions 1 and 3 above are erroneous because there was no evidence which would warrant the jury in finding that there was a sum of money in excess of $1,000,000 in the safety fund. We are unable to agree with this contention. We are of the opinion that the facts disclosed by the appellant's annual reports to the state's insurance department supplied evidence sufficient to allow the jury to pass upon this issue of fact. Those annual reports purport to be the ones required by law to be made by the appellant company to the insurance department of this state and any required statement- therein made as to the financial condition of the safety fund department were properly admitted in evidence, at the instance of plaintiff, as admissions of the appellant company. The appellant had the right, which right was accorded it, to explain the admissions contained in said report but it has no right as a matter of law to say that its explanation and not its prior written admissions shall be believed by the jury. It was, we think, clearly the jury's province to determine that point.

It is contended that instruction 2 above is erroneous be-
381 cause it places upon appellant the burden of showing that
Call 95 was made by the board of directors and that the assessment was not for a larger amount than was necessary to pay the death losses which had accrued up to that time. From the evidence offered, it appears that the charter and by-laws of the appellant company provide that all the affairs of the company should be managed and controlled by a board of directors.

In the recent case of Barber v. Hartford Life Insurance Company, (not yet officially reported), 187 S. W. 867, (a case very similar to the one now before us, and against the same company), Division One of this Court had before it the questions now urged by appellant. It was there held that in relying upon a forfeiture the burden was upon the company to show an assessment levied in strict accordance with the contract; that the assessment must be made by authority of the company's board of directors; and that a forfeiture of a policy could not be predicated upon the non-payment of an assessment which was excessive. The facts presented in the case at bar are sufficiently similar to the facts held in judgment in that case to bring this case clearly within the rule therein determined. We fully agree with the decision of that case upon the points here involved and it is, therefore, unnecessary to further discuss the various propositions here.

It is contended by appellant that, under the policy contract, it had the right to make assessments for death losses occurring in the future to provide a mortuary fund from which future death losses could be promptly paid. We are unable to agree with this contention.

This identical point was recently before the Supreme Court of Minnesota in the case of Ibs vs. Hartford Life Insurance Company,

121 Minn. 310. The policy contract there in judgment was issued by the appellant herein and the terms of the policy were in legal effect substantially the same as the terms of the policy contract now considered. It was there held that the policy contract did
382 not authorize the company "to accumulate a mortuary fund out of which to pay death losses that occur in the future." The court said: "It is settled law that an assessment to pay future losses is illegal, unless the power is conferred by the contract; and we hold that the contract between the insured and defendant can not be fairly construed as conferring that power. As it is clear that the assessment in question here was not necessary to pay accrued losses, but was in reality levied to pay losses that might be anticipated to occur in the future, it follows that it was unauthorized and could not be made the basis of a forfeiture." Id. l. c. 315. Among the authorities cited by the Supreme Court of Minnesota in support of that proposition is the case of Johnson v. Hartford Life Ins. Co., 166 Mo. App. 261, (the same being the opinion of the Kansas City Court of Appeals in the case at bar.)

We are aware that the judgment of the Minnesota Supreme Court in the case of Ibs v. Hartford Life Insurance Company, supra, was later, by the Supreme Court of the United States, reversed. [Ibs v. Hartford Life Insurance Company, 237 U. S. 662.] But the reversal was on a ground not involved in the case at bar, viz., on the ground that the full faith and credit clause of the Constitution of the United States (Art. IV, sec. 1) had been violated by the Minnesota court in rejecting proof of the record of a Connecticut court in a case known as the Dresser case.

The case at bar was tried below on May 12, 1909, which was prior in time to the entering of the decree in the Dresser case, and the record in the Dresser case was therefore not offered or presented in the trial of this case. Since the record of the Dresser case is in no manner properly raised or lodged in this case, we do not deem it
383 to be within the scope of our review and likewise the Federal question based thereon. Under such circumstances the rule announced by the Supreme Court of the United States in Ibs v. Hartford Life Insurance Co., supra, should not be applied to this case.

II.

It is further contended by appellant that the judgment must be reversed because there was an abandonment by the assured of the policy contract.

In approaching a consideration of this point it must be borne in mind that the sole function of this court, in this, a case at law, is to pass upon matters of error properly raised in the trial court and passed upon by that court.

We are unable to see wherein this point was presented or passed upon below. It appears that an abandonment was not even pleaded by appellant. "Abandonment of a contract of insurance is an affirmative defense which is waived if not pleaded." [Bacon on Life and Accident Insurance, Fourth Ed., sec. 364, page 760.] The only

portion of the answer which comes even near the point is the following:

"Defendant alleges that although the said James T. Johnson lived until the 15th day of January, 1907, or nearly five years after the forfeiture of said policy, by reason of the non-payment of said assessment in July, 1902, he, at no time, considered said certificate or policy in force, but at all times acquiesced in the forfeiture thereof, resulting from the non-payment of said mortality call or assessment."

It will appear at a mere glance that this does not plead an abandonment. Abandonment presupposes an existing valid right which is to be abandoned. Acquiescence in a forfeiture (a cancellation of a right), is quite a different thing from abandoning an existing right. In the former the loss of the right, if any, occurs by reason of
384 the forfeiture while in the latter the loss of the right occurs by voluntarily and intentionally surrendering an existing right. An abandonment might give cause for forfeiture but a forfeiture can supply no basis for an abandonment because when once forfeited the right does not remain to be abandoned.

The question of abandonment is one largely of intention and the burden of proof is upon the one who asserts it. Upon a proper showing, as a general rule, it becomes a question of fact to be determined by the jury. There was no attempt in this case to even submit that question to the jury—no instruction upon that theory was requested by the appellant.

We therefore rule this point against appellant on the sole ground that the issue was not raised in the trial below.

The judgment is affirmed.

All concur. FRED L. WILLIAMS, *Judge*.

385 And on the 7th day of June, 1917, a motion for rehearing was filed by the Appellant in said cause in said Supreme Court, which said motion for rehearing is in the following words and figures, to-wit:

386 In the Supreme Court of the State of Missouri, April Term, 1917.

No. 17399.

NANNIE M. JOHNSON, Respondent,

vs.

HARTFORD LIFE INSURANCE COMPANY, Appellant.

Appellant's Motion for Rehearing.

Now comes the appellant in the above-entitled cause and moves the Court to grant it a rehearing, and for grounds thereof appellant assigns the following reasons:

1. The Court erred in holding that the first instruction given on plaintiff's behalf by the trial court and which told the jury among

other things, that the plaintiff was entitled to recover if the jury found that the Safety Fund was in excess of one million
387 dollars ($1,000,000.00) at the time the assessment in question was made and levied, was supported and justified by the evidence in this cause. The holding of this Court that there was evidence sufficient to support this instruction is without foundation in the record; there is absolutely no evidence in this record that the Safety Fund of the Men's Division of the Safety Fund Department of the appellant company was in excess of one million dollars ($1,000,000.00) at the time the assessment was levied or at any time; on the contrary the undisputed and uncontradicted evidence shows that the amount in the Safety Fund of the Men's Division of the Safety Fund Department was not in excess of one million dollars ($1,000,000.00), and the holding and finding of this Court to the contrary being without support or foundation by the evidence in this case, its judgment herein is without due process of law and deprives the appellant of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The Court overlooked a question decisive of this case which was submitted by counsel for appellant, which is that the first instruction which told the jury that if it found "there was a sum of money in excess of one million dollars ($1,000,000.00) in the Safety Fund mentioned in the contract, and a surplus in the Mortuary Fund mentioned in the evidence, then it was the duty of defendant to have applied such excess to the payment of premiums of policy-holders; and if you find from the evidence that said Johnson's share in such excess, if any, was sufficient to pay the amount of premium due at the time said notice was given
388 to him, then defendant could not declare said insurance forfeited for the failure to pay said premium" was erroneous for the following reasons, which the Court overlooked in its opinion heretofore rendered:

First. Because there is no evidence what, if any, was the amount in the Safety Fund in excess of one million dollars ($1,000,000.00).

Second. Because there was no evidence of any surplus in the Mortuary Fund, and, furthermore, the trial court did not inform the jury what would constitute a "surplus" in the Mortuary Fund. This instruction gave the jury a roving commission to determine for themselves what would or would not constitute a "surplus" in the Mortuary Fund.

Third. Because there was no evidence whatsoever that the insured's share in the alleged excess of the Safety Fund and his share of the "surplus" of the Mortuary Fund was sufficient to pay the amount of the assessment in question, which, by this instruction, was made the condition upon which the defendant was precluded from declaring a forfeiture of this certificate.

The foregoing questions were presented by appellant in VI, VII and VIII of its Points and Authorities in its brief filed in this Court, and are discussed on pages 83-87 of its brief in this Court, as well as in Appellant's Statement, Brief and Argument in the Kansas City Court of Appeals.

3. (*a*) The Court erred in holding that under the charter of the appellant company, the board of directors of the appellant was required to make and levy the assessment in question. The charter of the appellant company does not require that its board of
389 directors shall make and levy assessments against the members of the Safety Fund Department, and the Court, in holding that the assessment in controversy should have been made and levied by the board of directors of the appellant company fails to give full faith and credit to a public act of the State of Connecticut, to wit, the public act and record by and under which the defendant is incorporated, the same being the legislative charter granted by the State of Connecticut, contrary to and in violation of Article IV, Section 1, of the Constitution of the United States.

(*b*) Because the opinion of this Court is in conflict with a controlling decision of the Court en banc, to wit, the decision in the case of Jones v. Williams, 139 Mo. 1, to which the attention of the Court was not called through inadvertence of counsel, in which it is held that the president of a corporation may exercise and perform discretionary acts for and on behalf of the corporation without any formal action, resolution or approval of the board of directors of such corporation.

4. (*a*) The Court erred in holding that the defendant did not plead an abandonment in its answer. The defendant pleaded in its answer the facts, which, if true, constituted an abandonment by the insured of this certificate.

(*b*) The Court erred in holding that the defendant should have requested the submission of the issue of an abandonment of this certificate to the jury. The evidence on the issue of abandonment was undisputed and uncontradicted and the determination of that issue, therefore, became a question of law for the Court and
390 not a question of fact for the jury, and the trial court should have sustained the peremptory instruction requested by the defendant at the close of the whole case.

5. The Court erred in failing and refusing to pass upon the issue with respect to the insured's acquiescence in the forfeiture of this certificate, which was pleaded by the defendant in its answer. The evidence concerning the insured's acquiescence in the forfeiture of this certificate was undisputed and uncontradicted, and the determination of this issue became a question of law for the Court and not a question of fact for the jury, and the trial court should have given the peremptory instruction requested by defendant at the close of the entire case.

6. The Court erred in failing to give full faith and credit to the decrees of the Superior Court of New Haven County, Connecticut, in the case of Dresser et al. v. Hartford Life Insurance Co. et al., as required by Article IV, Section 1 of the Constitution of the United States, which said decrees were incorporated in the appendix at the end of appellant's statement, brief and argument in the Kansas City Court of Appeals in this cause.

7. Because the judgment of the Court in this cause deprives the appellant of its property without due process of law, contrary to and

in violation of the Fourteenth Amendment to the Constitution of the United States, in this, that the defendant pleaded in its answer in this cause an abandonment of this certificate of membership by the insured and an acquiescence by the insured in the forfeiture thereof for the non-payment of the assessment in question, whereas this Court holds that no such issue was pleaded, by which ruling
391 this Court has denied and deprived the appellant of an asserted defense made to plaintiff's claim.

8. The certificate sued on by the plaintiff herein expressly provides that the amount thereof shall be paid out of the Mortuary Fund, of which the appellant is trustee, and not otherwise, and the appellant being merely a trustee of said Mortuary Fund, administering the same in accordance with the provisions of the certificate sued on and under the supervision of the courts of Connecticut, a judgment against it personally for the amount of said certificate deprives the appellant of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

——— ———,
——— ———,
Attorneys for Appellant.

392 Suggestions in Support of Motion for Rehearing.

A plea before a court of justice on behalf of 25,000 persons holding certificates of membership in the Safety Fund Department of the Hartford Life Insurance Company aggregating some forty-seven millions of dollars of insurance for the right to keep and maintain their insurance in that department in force for the benefit of their dependents; and a plea on behalf of such dependents for the right to receive such insurance upon the death of the members, of which rights they will be deprived if this Court adheres to its former ruling in this cause.

We respectfully but earnestly ask the Court to reconsider its opinion and decision in this cause which is manifestly contrary to and in violation of well-established and fundamental principles of law.

We are not unmindful of the attitude of some courts to strain, bend, and even break and nullify well-established and fundamental principles of law when in the opinion of the Court the exigencies of a hard case demand it, but we respectfully submit that the Court is not called upon or justified in adopting any such attitude in this case, and especially is this true if your Honors will pause for a moment and consider what will be the result of an adherence to the opinion filed.

Disregarding for the moment the legal principles herein involved, what are the equities of this case?

The defendant company operates and conducts co-operative
393 and assessment insurance on the mutual plan in what is known as its Safety Fund Department. There are two di-

visions of the Safety Fund Department, one the Men's Division, organized in 1879, and consisting solely of male members and those female members who entered this department prior to 1882, and the other, the Women's Division, established in 1882, and which consists only of female members, the two divisions being separate and distinct departments and operated separately and independently the one of the other. Johnson's certificate being issued in the Men's Division, we are only concerned in this case with that division, and the expression, "Safety Fund Department," as hereinafter used, for brevity, has reference only to the Men's Division of that department unless otherwise noted.

The certificates of membership of the Safety Fund Department have no relation to the policies issued by the defendant on the level premium, legal reserve plan; and, in fact, since the institution of this action the defendant has reinsured all of its legal reserve policies with another company and is now engaged solely in the operation and maintenance of its Safety Fund Department, both Men's and Women's Divisions.

The certificate of membership issued in the Safety Fund Department provides that each member shall contribute the sum of $10.00 for each $1,000.00 of insurance held by him toward the creation and maintenance of a fund described in the certificates as the "Safety Fund." This Safety Fund is held, controlled and administered by the Security Company of Hartford under the provisions of a trust agreement between the defendant and the Security
394 Company as trustee, a copy of which is attached to and made a part of each certificate of membership. Under the terms of this trust agreement, it is provided that the $10.00 payments made by each of the certificate holders in the Safety Fund Department shall be invested by the Security Company, as the trustee of that fund, in certain designated securities; that when this fund reaches the sum of $300,000.00, the dividends therefrom, and when it reaches the sum of $1,000,000 both the dividends therefrom and all further contributions thereto shall be applied to the reduction of the assessments of the certificate holders; and that, if at any time the defendant shall fail, by reason of the insufficiency of the members of this department, to realize from the proceeds of the assessments levied upon such members an amount sufficient to pay any certificate which has matured as a death claim, the trustee shall, forthwith, divide and distribute the principal of that fund, after paying such death claims, pro rata among the certificate holders whose certificates are then in force; and the insurance in this department shall thereupon cease and determine. This Safety Fund, as its name indicates, was intended for the protection and safety of the certificate holders of this department, if for any unforeseen reason, such as a war or an epidemic of disease, etc., the assessments should not realize sufficient to meet the mortuary requirements of this department from the death of members.

In addition to their contributions to the Safety Fund, each member, under the terms of the certificate, is subject to an assessment at cer-

tain quarter annual periods for each $1,000.00 of death losses
395 at a rate varying from ninety-eight cents ($.98) at age fifteen to six dollars ($6.00) at age sixty-five for each $1,000.00 of insurance held by such member, with a provision that these rates shall decrease in proportion as the total insurance in force in this department increases above $100,000.00 in amount. The proceeds of these mortuary calls or assessments under the terms of the certificates are paid into a fund known as the Mortuary Fund from which fund all death losses are payable, this fund being replenished from time to time by the proceeds of the quarter-annual assessments and it is also expressly provided that the Mortuary Fund alone (and not the defendant company) shall be chargeable with the payment of any certificate matured by the death of a member of this department. This, in brief, constitutes the fundamentals of the plan of insurance of the Safety Fund Department of the defendant company, of which the insured, Johnson, was a member.

Johnson held a certificate in this department for $5,000.00, issued in 1888, and was accordingly required to and did pay towards the Safety Fund the sum of $10.00 for each $1,000.00 of insurance held by him, or a total of $50.00. From this Safety Fund he received as dividends during the continuance of his certificate the sum of $52.75, which was applied to the reduction of his assessments, or $2.75 more than he had actually paid into that fund; and he still retained the additional right to receive his proportion of the principal of that fund if at any time, on account of the insufficiency of the members of this department, the assessments should prove insufficient to take care of the death losses of the department.

396 Johnson duly paid all the assessments levied against him to meet the mortuary requirements of this department until 1902; he failed to pay a mortuary call or assessment due June 1, 1902, although repeated requests were made upon him for the payment of the same, and several extensions of time were granted him in which to make this payment. Furthermore, Johnson lived for five years after the non-payment of the assessment due June 1, 1902, during which time twenty assessment periods intervened; but at no time during this period did he ever attempt or offer to pay the assessment due June 1, 1902, or pay or contribute one penny towards the payment of mortuary losses of this department, during that period.

How, then, stand the equities of this case as between Johnson and those members of the Safety Fund Department who continued to pay their assessments?

By what rule of reason, law, equity or natural justice is the beneficiary of Johnson's certificate entitled to recover the benefits of a contract, the burdens of which Johnson relinquished many years before?

By what rule of reason, law, equity or natural justice may the members of the Safety Fund Department who have faithfully borne their share of the burdens of the death losses of their fellow members during all of these years now be required to pay the benefits once provided by Johnson's certificate, when Johnson not only re-

fused to pay his proportionate share of particular death losses incurred five years previous to his death, but for five long years contributed absolutely nothing towards the payment of the mor-
397 tuary losses of this department during that period?

By what rule of reason, law, equity or natural justice does this Court adjudicate that the beneficiaries of certificates which lapsed one, five, twenty, or even twenty-five years back for the non-payment of the members' share of the mortuary losses and who have paid nothing since shall, at the expense of those members who have not only faithfully borne their share of the mortuary burdens of this department, but have also been saddled with the additional mortuary burdens relinquished and abandoned by the quondam members, nevertheless be entitled to demand that these faithful members shall now be required to provide the funds necessary to pay the benefits of these lapsed certificates, that they shall garner where they have not sown?

Consider for a moment that the inevitable result of an adherence to the opinion filed will be a demand for the payment of certificates aggregating many thousands of dollars, nay, even millions of dollars, which lapsed many years prior to the death of the insurants for the non-payment of their share of the mortuary requirements of this department; which demands the existent members will be unable to meet even if they were so inclined, thereby resulting in a distribution of the Safety Fund and a winding up of the insurance in this department, and a deprivation of the existent members of the insurance which for many years they have struggled to keep in force for the benefit of their dependents, and that in many instances these dependents will lose that which was to be the sole means of their sustenance upon the death of the members.

398 Bear in mind, if your Honors please, that it does not profit or injure the defendant company one penny whether this judgment be affirmed or reversed, as under the express terms of the certificate the obligation for the payment is not upon the defendant but upon the Mortuary Fund of this department, i. e., the liability of the members for the payment of the mortuary losses, and that it has been judicially decreed by the courts of Connecticut (Dresser et al. v. Hartford Life Insurance Company; see appendix to appellant's statement, brief and argument in the Kansas City Court of Appeals) that the defendant is not otherwise liable for the payment of death losses in this department. It is primarily and *in* entirely on behalf of the existent members of the Safety Fund Department of the defendant company that we now ask your Honors to consider whether or not your ruling is in accordance with the fundamental and well-established principles of law applicable to the issues involved in this case, and also whether your former ruling is predicated upon the administration of equal justice between man and man, because this controversy is in reality between man and man and not between the beneficiary of an insurance policy and an insurance company.

I.

The evidence does not support or justify the instruction given by the trial court at plaintiff's instance permitting a finding that the Safety Fund of the Men's Division of the Safety Fund Department was in excess of one million dollars ($1,000,000.00) at the time the assessment in controversy was made and levied, and the
399 holding and judgment of this Court to the contrary being without support or foundation by the evidence in this record, its judgment deprives the appellant of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

This Court has committed a most gr-evious error in holding that the evidence in this cause supported and justified the first instruction given by the trial court at plaintiff's request that the plaintiff was entitled to recover if the jury found that the Safety Fund of the Men's Division of the Safety Fund Department was in excess of one million dollars ($1,000,000.00) at the time the assessment in controversy was made and levied. The evidence, on the contrary, shows absolutely and without contradiction that the Safety Fund of the Men's Division of the Safety Fund Department was not in excess of one million dollars ($1,000,000.00) at the time this assessment was made and levied. The only evidence upon which this Court relies in support of its ruling is the annual reports filed by the appellant company with the Insurance Department of Missouri for the years 1900 to 1906. But, upon an examination of these reports and the items thereof which are embodied in the statement of this Court in its opinion, what do we find? Not that the Safety Fund of the Men's Division of the Safety Fund Department was in excess of one million dollars ($1,000,000.00). Not that any one Safety Fund was in excess of one million dollars ($1,000,000.00), but that the aggregate of "the net Safety Funds in the Security Company" was in excess of one million dollars ($1,000,000.00). The evidence in this case shows absolutely and unequivocally and with no contradiction
400 that there were two Safety Funds of the Safety Fund Department held by the Security Company of Hartford, Connecticut, as trustee, the Safety Fund of the Men's Division and the Safety Fund of the Women's Division of the Safety Fund Department of the defendant company. The unequivocal and undisputed and uncontradicted evidence also shows, and we do not understand that the respondent has ever contended to the contrary, that the Men's Division of the Safety Fund Department and the Women's Division of the Safety Fund Department were separate and independent divisions, established at different times; the certificates issued in the two departments containing different provisions; the assessment payable by the members in the two departments being different; the provisions of the trust agreements pertaining to the Safety Funds in the two departments and the manner and method of administration and distribution by the Security Company as trustee being different; the funds, Mortuary and Safety, of the one division being kept separately

and independently of the Mortuary and Safety Funds of the other division; the members of the one division being assessed at different periods and at different rates than the members of the other division, the death losses in the Men's Division being paid solely from the Mortuary Fund of the Men's Division and the death losses of the Women's Division being paid solely from the Mortuary Fund of the Women's Division, the two divisions, in effect, being operated and maintained as though by two different companies.

In its reports to the Insurance Department of Missouri the
401 defendant, instead of designating the amount in the Safety
Fund of the Men's Division and the amount in the Safety Fund of the Women's Division, reported the aggregate amount of the Safety Funds of both the Men's and the Women's Divisions as the "net Safety Funds in the Security Company," which shows conclusively that there was more than one Safety Fund held by the Security Company. How can this Court justify its holding and finding that any such evidence as this was sufficient to authorize the jury in finding that the aggregate amount of one Safety Fund was in excess of one million dollars ($1,000,000.00), when all the evidence shows conclusively and unequivocally that there was more than one Safety Fund, and that neither aggregated the sum stated?

The testimony of the officers of the defendant company, as well as the testimony of the officers of the Security Company, the Trustee of both Safety Funds, as well as the books and records of both companies, shows absolutely and unequivocally that the Safety Fund of the Men's Division never at any time exceeded the sum of one million dollars ($1,000,000.00), that the amount reported by the defendant to the Missouri Insurance Department was the aggregate of the amounts in the Safety Fund of the Men's Division and the Safety Fund of the Women's Division at the time the reports were made, and also that the aggregate of amounts in the Safety Fund of the Men's Division and the Safety Fund of the Women's Division was the amount reported by the defendant company to the Insurance Department of Missouri as the "net Safety Funds in Security Company." O tempora! O mores!—that in this enlightened day
402 and generation a court of justice should base its judgment
upon such an arbitrary ruling as this—that some twenty-five thousand persons, holding some forty-seven millions of dollars of insurance and who have struggled for years to maintain their insurance in force for the benefit of their families and dependents, should now be deprived of this insurance and their dependents deprived of this protection by a ruling of a court of justice that two is not two but one.

A jury may find the fact either way when there is some evidence to support either finding, but to uphold a jury's finding and base a judgment thereon when the finding is one way and all the evidence is the other way is not the administration of justice, but the administration of injustice.

The Court furthermore overlooked other and additional reasons urged by the appellant in its briefs in this case as to why the first instruction was erroneous. In this instruction the jury were told

that if they found that there was an excess of $1,000,000 in the Safety Fund and a "surplus in the Mortuary Fund, then it was the duty of the defendant to have applied such excess to the payment of premiums of policy holders, and if you find from the evidence that said Johnson's share in such excess, if any, was sufficient to pay the amount of premium due at the time said notice was given to him, then defendant could not declare said insurance forfeited for failure to pay said premium." There was absolutely no evidence of any surplus in the Mortuary Fund at the time this assessment was levied, and, furthermore, the jury were not informed what would be
403 a surplus in the Mortuary Fund. This instruction simply gives the jury a roving commission without guide or compass to delve in the realm of speculation and determine for themselves what would constitute a surplus in the Mortuary Fund. Furthermore, there is absolutely no evidence in this case that the insured's share of the alleged excess of the Safety Fund and the surplus in the Mortuary Fund was sufficient to pay the amount of the assessment in question, which, by the terms of the instruction, is made the condition upon which the appellant was precluded from declaring a forfeiture of this certificate. The amount of this assessment was $74.55. But neither this Court, nor the jury, nor counsel, could possibly say whether the insured's share of the alleged excess in the Safety Fund or in the "surplus" of the Mortuary Fund of the Men's Division of the Safety Fund Department was more or less than $74.55. To determine this, the amount of such excess, if any, must first be ascertained and then the proportion thereof belonging to every other member of the 25,000 members of the Men's Division of the Safety Fund Department must be ascertained in order to arrive at Johnson's share. None of these basic facts are proven, and this instruction amounted to nothing more or less than an invitation to the jury to enter the field of conjecture and base their verdict on pure speculation. How can the verdict be sustained on such an instruction as this?

404

II.

The Court erred in holding that under the charter and by-laws the Board of Directors of the defendant was required to make and levy the assessment in controversy.

There is no provision either in the charter or by-laws which requires that the Board of Directors of the defendant company shall make and levy assessments. The provision of the charter referred to by the Court is as follows:

"All the affairs of the corporation shall be managed and controlled by the Board of Directors."

In the first place this provision of the charter was intended for the benefit and protection of the stockholders of the defendant company and not for the benefit of third persons. Suppose, for instance the defendant company had sold some of its property, real or personal, to a third person and afterwards the property having depreciated in value or for some other reason the purchaser sought to have the sale

set aside and his purchase money returned on the ground that the Board of Directors of the defendant had not formally authorized the sale. What standing would such a person have in a court of equity or law with such a claim? Yet the supposed case is no different from the decision of your Honors in this case. The insured Johnson was in no sense a stockholder of the defendant company, but was simply a member of a mutual organization of which the defendant company was merely an agent or trustee for all the members in conduct-
405 ing and operating the plan of insurance provided. In making and levying these assessments the defendant was not performing an act which affected its stockholders as such, but, on the contrary, was merely acting as a trustee or agent for third parties i. e., the members of the Safety Fund Department, under and pursuant to the terms of the agreement between it and the members of that department.

In the second place, the making and levy of the assessments under the certificates did not require any act of discretion. The assessments were fixed and determinable by the rates for the respective ages of the members as set forth in the tables of rates attached to this certificate and by the aggregate amount of the unassessed for death losses outstanding at the time the assessment was made. The act of levying assessments required the exercise of no more discretion, indeed far less discretion, than is exercised daily by the clerk of this court or by a trust company or by any other corporation, as, for instance, in the matter of selection of attorneys and counsel, which of itself involves the exercise of a higher discretion than that which was involved in the levying of this assessment, and no one for a moment would contend that a corporation must, in order to legally employ an attorney, get the order of the Board of Directors.

Even conceding, however, that the making and levy of the assessments did require the exercise of some discretion, was it such discretion which could not be exercised on behalf of the defendant by its officers? No one would assert that a trust company whose very business it is to execute trusts can only exercise the discretion which is required daily in the administration of its trusts by an order
406 of the Board of Directors in each instance. This would require the Board of Directors to be in constant session. We al[l] know, as a matter of common knowledge, that they don't do this and that the officers of such companies may and do act in matters involv[ing] far greater discretion than that required in making and levying the assessments under these certificates, the amount of which is fixe[d] by the terms of the certificate and the amount of the outstanding death losses at the time the assessment is levied. Furthermore, th[e] opinion of the Court in this regard runs directly counter to th[e] opinion of this Court in Jones v. Williams, 139 Mo. 1. In that cas[e] this Court, in holding that the president of a corporation operating [a] daily newspaper and managed by a board of directors, had the powe[r] and authority by virtue of his office to appoint and employ another a[s] manager and editor of the newspaper without any formal action b[y] the board of directors, says:

"At common law the power to have a board of directors was in

herent in the corporation. The statute of Missouri requiring the business and property, of a corporation to be managed and controlled by directors is but an affirmance of the common-law power. So, likewise, the directors have the power, without statutory authority, to delegate to officers, agents or executive committees the power to transact, not only ordinary and routine business, but business requiring the highest degree of judgment and management. Thus authority to manage the business of railroad corporations, insurance companies, banking institutions and other corporations having large and complicated business interests is, usually, delegated by the
407 directors to agents, often, but not necessarily, officers of the corporation. These agents or managing officers have incidental power to employ all assistants and to do all acts necessary to properly conduct the business over which they are given charge. Formal action of the board of directors is not necessary to confer the authority."

Manifestly, the employment by the president of a large newspaper of a manager and editor who is to direct and control the policy and management of the newspaper requires the exercise of a far greater discretion than is required in the making and levy of assessments under these certificates in controversy, and if in the Jones case (supra) the employment by the president of a manager and editor of a daily newspaper was binding upon the corporation without any formal action by the board of directors, why, pray, was not this assessment binding upon Johnson even though the Board of Directors of defendant by solemn meeting and conclave did not actually make and levy the same?

It will be noticed, furthermore, that in the Jones case, supra, a statute of Missouri, which is substantially in the language of the provisions of defendant's charter and by-laws, required the business and property of corporations to be managed by boards of directors, but, nevertheless, the Court held that this statute did not render invalid a contract of employment by the president of the corporation in that case of a manager and editor of a large newspaper; and if this is so, why, pray, is the assessment in controversy declared to
408 be invalid under charter provisions substantially the same as the provisions of the Missouri statute, because, forsooth, it was made by the officers and not by the Board of Directors of the defendant company?

We are aware that Division No. 1, in Barber v. Hartford Life Insurance Company, 187 S. W. 867, has heretofore decided against the defendant on this issue, but that case is now before the Supreme Court of the United States for consideration, and we confidently expect that Court to entertain a view very materially different from that announced by Division No. 1. Furthermore, if your Honors will examine the cases relied upon by Division No. 1 in support of its holding that the board of directors were required to make and levy these assessments, you will find that each and every one of those cases are easily and readily distinguishable from the case here involved, for the reason that in each and every one of those cases the board of directors were expressly required either by the charter provisions of

the company or by some special statutory enactment to make and levy the assessments or perform the corporate act there involved. If the charter or by-laws or a statute of Connecticut had expressly provided that all assessments under the certificates in question should be made and levied by the board of directors, no one questions and the authorities hold that that duty must be performed by the board of directors and not by the officers of the company. But, manifestly, such a ruling has no application where, as here, neither the charter, the by-laws of the defendant company, nor any statute of the
409 State of Connecticut expressly requires that the board of directors shall make and levy these assessments.

Furthermore, all assessments previous to the assessment in question were made and levied by the officers which, in effect, amounted to a delegation by the board of directors to the officers of the power and duty to make and levy these assessments. The delegation of a power by the board of directors does not necessarily require an express resolution by the board, but such delegation may be shown by acts in pais. In this connection the Court, in the Jones case, supra, says, l. c. 27:

"However that may be, 'there can be no doubt,' says Morawetz, 'that the board of directors may invest the president with authority to act as chief executive officer of the company. This may be done either by an express resolution or by acquiescence in a course of dealing.' * * * (Morawetz on Corp., Sec. 538.)"

If the Court will bear in mind that in making and levying these assessments the defendant was merely acting as trustee for the members of the Safety Fund Department; that the members of that department were conducting this department for their mutual benefit and protection; that it is the members of this department and not the defendant who provide the funds necessary to pay all death losses in this department; that if the assessment in question was invalid as to Johnson, because, forsooth, it was not made and levied by the board of directors of the defendant company, then it was also invalid as to each of the other twenty-five thousand members of that department for the same reason; that the evidence shows absolutely,
410 and we do not understand that this has ever been disputed by respondent, that the assessment in controversy represented Johnson's portion of the mortuary requirement of the company at that time; that the validity of this assessment was never questioned by Johnson on the ground that it was made and levied by the officers and not by the board of directors of the defendant, and he lived for five years after this assessment was levied—we say, bearing in mind all of these matters, we do not see how the Court can come to any other conclusion than that your former ruling is erroneous.

III.

The Court erred in holding that the defendant did not plead an abandonment of the certificate of membership by the insured.

It is true that the defendant in its answer did not plead an abandonment, eo nomine, of this certificate by the insured, but in every

previous decision in which this Court has ever considered and passed upon the system of pleading in this state it has been held that the facts upon which a defense is predicated should and must be stated and not the conclusion of the pleader from the facts. Suppose, for instance, that the plaintiff had pleaded by way of a reply in this case that the defendant had "waived" the forfeiture of this certificate without setting up the facts constituting a waiver—would that have been sufficient? It would not have been sufficient under many previous decisions of this Court. On the other hand, suppose that the plaintiff in the reply did not plead waiver eo no-
411 mine, but alleged that on "the due date of this assessment
the defendant informed and notified the insured that said assessment need be paid at any time within thirty days after its due date," would this Court for a moment hold that the plaintiff was not entitled to rely upon a waiver of the forfeiture because, forsooth, it had not pleaded a waiver eo nomine? To so hold would be to reverse and nullify a well-established and fundamental rule of pleading. Take, for another example, a plea of contributory negligence in a personal injury case. An answer by a defendant that the injury was the result of contributory negligence on the part of the plaintiff without alleging the facts constituting such contributory negligence has been uniformly held to be bad pleading, because it constitutes a mere conclusion on the part of the pleader (Harrison v. Missouri Pac. Ry. Co., 74 Mo. 364, 369; Nepler v. Woodward, 200 Mo. 179, 187). Suppose, on the other hand, that the defendant does not plead contributory negligence eo nomine, but alleges that the injury to plaintiff was due to the act of plaintiff in voluntarily sticking his hand on a red-hot stove—would the Court say that the defendant was precluded from asserting the defense of contributory negligence because it was not alleged eo nomine that the defendant was guilty of contributory negligence, which is but a mere conclusion of law? It is the facts which constitute the waiver, the contributory negligence or the abandonment which must be pleaded, according to every other decision heretofore rendered by this Court. The defendant in its answer in this case pleaded the facts, which, if true, constituted an abandonment of this certificate by the insured. It alleged in this answer
412 that "although the said James T. Johnson lived until the
15th day of January, 1907, or nearly five years after the forfeiture of said policy, by reason of the non-payment of said assessment in July, 1902, he at no time considered said certificate or policy in force".

If this allegation, if true, did not constitute an abandonment by the insured of this certificate, then we are at a loss to understand what would constitute an abandonment.

It has been repeatedly held by this Court from its earliest decisions down to the present time that under our system of procedure the Court may give any relief consistent with the allegations of the petition without regard to what is asked for therein (Liese v. Meyer, 143 Mo. 547), and if this is so, then it must necessarily follow that if the evidence in this case established the allegations

of defendant's answer that "although the said James T. Johnson lived until the 15th day of January, 1907, or for nearly five years after the forfeiture of said policy by reason of the non-payment of said assessment in July, 1902, he at no time considered said certificate or policy in force, but at all times acquiesced in the forfeiture thereof, resulting from the non-payment of said mortality call or assessment" (and these allegations are established by undisputed and uncontradicted evidence), and, if such facts preclude a recovery by plaintiff (and all the authorities so hold), then the allegation of such facts was all that was required of the defendant in its answer and it would have been improper for the defendant to have gone further in its answer and alleged that such facts constituted an abandonment of this certificate by the insured or to have pleaded an abandonment eo nomine without setting
413 up the facts upon which its plea of abandonment was predicated, for this would have been a mere conclusion of law on the part of defendant. The character and effect of a pleading is to be determined from its statement of facts and not from its name and if the facts stated constitute a defense that is all that is required.

The purpose of an answer under every system of jurisprudence is supposed to inform the opposite party of the defenses to the claim asserted, in order that he may rebut the defense, by contrary evidence, and, if the foregoing allegation in the defendant's answer in this case did not advise the plaintiff that the defendant intended to resist the claim asserted because the insured during the five years subsequent to the non-payment of the assessment due June 2, 1902, at no time considered said certificate in force, then we confess we would not know how to set about advising her. If the insured did not consider his certificate in force at any time during the five years succeeding the assessment due June 2, 1902, then the plaintiff, under the authorities, is not entitled to recover whether the action of the insured in this respect is termed an abandonment, a renunciation, a relinquishment and abdication, or what not.

In addition to the foregoing allegations in its answer the defendant alleged that during the five years intervening between the non-payment of the assessment due in July, 1902, and its consequent forfeiture, the insured "at all times acquiesced in the forfeiture" of the certificate or contract of insurance. If the acquiescence in an alleged forfeiture of a contract by one of the parties thereto does not constitute an abandonment of the
414 contract, then, pray, what would constitute an abandonment? But if an "acquiescence in a forfeiture" does not constitute an abandonment, it certainly constitutes an acquiescence in a forfeiture and an acquiescence in a forfeiture of a policy by an insured precludes a recovery by the beneficiary, and this much at least was certainly pleaded in the answer, but the Court does not pass upon this issue in its opinion.

As an abandonment of this certificate or at least an acquiescence in its forfeiture was pleaded by the defendant, it then remains to be determined whether the defendant should have requested the trial court to submit this issue to the jury by instruction. In this

connection there is another well-recognized and fundamental rule in this state to the effect that where the evidence on any particular issue is conceded, undisputed or uncontradicted the determination of the issue becomes a question of law for the Court and not a question of fact for the jury. Suppose, for instance, that an issue had been made in this case of a forfeiture of this certificate on June 1, 1902, its due date, and the plaintiff had contended that the defendant had waived the forfeiture for the non-payment of the assessment on June 1, 1902, by agreeing, as it did, to accept the payment thereof at any time before July 15, 1902. Would the Court hesitate for an instant in holding that it would have been the duty of the trial court to declare as a matter of law that the defendant had waived the forfeiture of the certificate for its non-payment on June 1, 1902, when the conceded or undisputed evidence showed that the defendant had agreed to accept payment of
415 the assessment at any time before July 15, 1902? Manifestly
not, and yet that is precisely the case here. The undisputed and uncontradicted evidence showed that the insured received the notice of the assessment due June 1, 1902; that at his request the time of payment was extended to July 15, 1902; tha. he never paid this assessment when due, although he lived for five years thereafter; that during those five years he never attempted or offered to pay this assessment; he never made any protests concerning the same, and he never took any action in anywise indicating that he considered the certificate to be in force. Under these circumstances it became the duty of the trial court to declare, as a matter of law, that the plaintiff could not recover, and this the Court was asked to do in the requested instruction to find for the defendant, and it was error to refuse the instruction. The case of Lavin v. Insurance Co., 112 Mo. App. 1, is quite pertinent in this connection.

In the Lavin case an assessment became due in September, 1900. The evidence for the plaintiff tended to show that the amount of this assessment or an amount for which the insured claimed he was liable was tendered to the defendant and refused. The evidence for the defendant, on the other hand, tended to show that no such tender was made, but there was no evidence that the insured ever at any time thereafter offered to make any payments on account of subsequent assessments, nor did he by any act ever indicate in any way that he still considered his certificate in force, although he lived until July, 1901, some ten months after the assessment due September, 1900.

The trial court submitted to the jury the question whether
416 the insured had abandoned or acquiesced in a forfeiture of
his certificate, and the jury found in favor of the plaintiff. The Court, on appeal, in an opinion rendered by Goode, J., after an exhaustive review of the authorities, held that as it did not appear that the insured after the non-payment of the assessment due in September, 1900, and up to the time of his death in July, 1901 ever took any steps or indicated by an act that he considered the certificate in force, the trial court should have directed the jury to find for the defendant and accordingly the Appellate Court

directed that judgment be entered for the defendant. The Court in this connection said:

"The position taken by the defendant's counsel is that these undisputed facts show an acquiescence in his (insured's) suspension, if he knew it, or if he did not, an abandonment of the order; that if he expected to retain his insurance he was bound to treat himself as a member and seek reinstatement, or at least offer to pay subsequent assessments which the by-laws required every member of the order to pay each month. The Circuit Court took that view, as appears from the following instruction given to the jury:

"'The Court instructs the jury that even if they find from the evidence that Patrick Lavin, or some one for him, tendered the financier of the Standard Lodge No. 80, in proper time, his assessment for September, 1900, and that the tender was refused, such refusal did not justify said Lavin in thereafter neglecting to pay or offer to pay subsequent assessments; and if the jury finds that between November, 1900, and July 24, 1901, the date of his death, said Lavin did not pay or offer to pay further assessments, nor take any action toward disaffirming his suspension, if he knew
417 it, then said Lavin acquiesced in his suspension, and the jury must find for the defendant.'

"That instruction submitted the issue of whether Lavin defaulted in his assessments after September, and precluded recovery on the certificate if he did. This was trying the case according to the theory of the defendant's counsel, whose complaint is not of the instruction, but that the jury ignored it, as all the evidence went to show nothing was paid by Lavin after September. This was true, and, if the instruction was sound, the Court should have gone further, and ordered the jury to return a verdict in favor of the defendant. The question for us to decide, then, is, does the fact that Lavin paid no assessments after September bar recovery, if, as the jury must have found, he had tendered the full amount due in September on two occasions and the financier of the order had refused to accept the tenders."

The Court then makes an exhaustive review and examination of the authorities and holds that the failure of the insured to make any subsequent payments on account of assessments or to take any action in anywise indicating that he still considered the certificate in force, albeit he had tendered the amount of the assessment due in September, 1900, which was refused by the defendant, says:

"This Court has had occasion to deal with the question, and we think the fair deduction from its decisions is that unless there is some better reason than existed in this case for a member's failure to remonstrate against his suspension, or tender assessments after one has been declined, he loses his right as a member. The sub-
418 ject was first touched in Mulroy v. Knights of Honor, 28 Mo. App. 463. Mulroy had been unlawfully expelled by his lodge, and, so deciding the opinion remarked that, as his expulsion was void, it was not incumbent on him to take steps to have it reversed in a higher tribunal of the society, but he was left clothed with the rights of membership despite the action of the society against him; that if he paid no assessments thereof, he was not noti-

fied to pay any, and, consequently, non-payment worked no forfeiture of his insurance. That doctrine would support the plaintiff's case if it had been adhered to, but it was renounced. In Hoeffner v. Grand Lodge, 41 Mo. App. 359, the insured had been unlawfully expelled, and it was held a recovery might be had on the certificate of insurance by the widow of the member, as the evidence showed 'all dues to the society were tendered when payable, between the date of the alleged expulsion and the date of the member's death,' and there was no evidence that other duties were required of members which the deceased failed to perform. Those remarks indicate that this Court deemed it incumbent on a member of a benefit society, when unlawfully suspended or expelled, to act thereafter as a member, if he wished to enjoy the rights and privileges of one; that he might not behave as though the rules of the order were no longer binding on him, perform none of his duties, pay none of his dues and assessments, and still retain the same privileges and benefits he would enjoy if he was carrying his share of the society's burdens. A suspended member must either acquiesce in his suspension or protest against it—must keep his insurance cum onere. If he does not protest formally and by words, he must treat his membership as still subsisting, not alone for the purpose of giving rights, but for
419 the purpose as well, of imposing burdens. He can not elect
to regard it as at an end, so far as the obligation to pay dues and assessments and comply with the other rules of the order is concerned. He must treat himself as in the order for all purposes, or as out of it * * *.

"The defendant's only breach of duty, according to the version of plaintiff's witnesses was to refuse payment of one month's assessment when tendered. The ground of the refusal was stated at the time, and was that the sum tendered was insufficient. No construction could be put on such an act, except that a sufficient sum would be accepted; and, if the sum tendered was, in fact, enough, it was apparent that a mistake had occurred. According to the plaintiff's testimony, the tenders were made on the 3rd and 5th of September, and from then on until Lavin died, the latter part of the following July, the defendant's officers never heard from him. He neither protested against his suspension, nor took a single step to have his rights restored and keep his contract alive, though he was familiar with the laws of the order by which he was bound. He knew that if his assessments were not paid by the 28th of each month, he would be suspended, for it is shown that a paper containing advice of that kind was sent to him regularly. We have been allowing the plaintiff the benefit of her evidence in this discussion, because it found credence with the jury. To our own minds the evidence is well-nigh irresistible that the full assessment for September was never tendered, and that Lavin deliberately abandoned the order. But be that as it may, it is our duty to treat the case according to the testimony of the plaintiff * * *.

"If Lavin's tender of the September assessment was re-
420 fused by mistake, under a misapprehension of the amount
due, the blunder might never have been detected by the de-

fendant if the insured took no further action. He would, therefore, have stood suspended without the order being aware that it had wronged him, or was under a duty to notify him that future assessments would be received. We think something more than an offer to pay in the early part of September was incumbent on Lavin, to preserve his contract in force during the rest of his life, and, as he did nothing more, he ought to be held to have acquiesced in the suspension, if he knew of it, or, in any event, to have abandoned his membership. Any other view would be extremely detrimental to the welfare of such societies, and, as pointed out in the case to be noticed, would put a wrongly suspended member in a better position than other members, by continuing his insurance indefinitely without the payment of premiums or assessments. In Glardon v. Supreme Lodge, 50 Mo. App. 45, this Court, in dissatisfaction with what had been said in the Mulroy case, recurred to that opinion and modified it, approving, incidentally, the doctrine of the Hoeffner case, stated above, which is that, in order for the beneficiary to recover on a certificate of insurance in a benevolent society after the wrongful expulsion of the insured member, it must appear 'that the member himself treated the expulsion as void.' That is the language used in the Glardon opinion in stating the rule announced in the Hoeffner case. The Glardon case pronounced that rule to be a necessary and salutary qualification of the doctrine in the Mulroy case, and stated reasons why the qualification was necessary. Among
other things, the Court said * * * 'The rights of such a
421 member, as has often been pointed out, rest merely in con-
tract, and, hence, his expulsion from the lodge and the order, and his consequent deprivation of his membership and of his life insurance under his benefit certificate, is no more than the breach of a contract; and, although taking place by an act void for want of jurisdiction, it is no more than an act which is void in the sense of being voidable at the election of the member thus expelled. Clearly, he may, at his election, affirm or disaffirm it. Where, as in the Mulroy case, he resists the expulsion, though without appeal, and fails for a year to pay subsequent dues, because such dues are not demanded of him, it may be regarded that he has sufficiently manifested his disaffirmance of the sentence of expulsion, and where, as in the Hoeffner case, he continues to tender all dues when payable, this is clearly so.' Other pertinent remarks which we do not care to recite, were made in support of the doctrine that if a member wrongly suspended or expelled does nothing thereafter in the way of protest or to show that he regards himself as a member despite his suspension, he should be deemed to have acquiesced in the suspension * * *.

"In view of all the facts, we think no other conclusion can be reached, under the evidence, than that Lavin, after September, 1900, abandoned membership in the defendant order."

What does the undisputed and uncontradicted evidence in the case at bar show?

First. That Johnson received notice of Mortuary Call or assessment due June 1, 1902. That fact is established by a return receipt

bearing his signature of a letter sent by registered mail by the defendant enclosing a second notice of this call or assessment.

422 Second. That the insured knew that his certificate would be forfeited for the non-payment of this call or assessment because the certificate expressly informs him that in the event of the failure to pay any assessment when due the certificate should ipso facto become null and void and all rights of the member should cease and determine. That the insured did receive the notice of this call or assessment and was aware of the effect of its non-payment is clearly evident from the following letter from insured's son in reference to this case (Rec., p. 214):

"Schell City, Mo., June 19, 1902.

Hartford Life Ins. Co., Hartford, Conn.

GENTLEMEN: My father and I both have been out of town and did not get to attend to payment due on policy 109854 Hartford Life & Annuity Ins. Co. on life of Jos. T. Johnson. I see our time expires tomorrow. What steps can we take now to make payment and have it reinstated? Father is in perfect health. I am very sorry indeed of the delay, but it could not possibly be avoided. Kindly let us know by return mail.

Yours very truly,

GARLAND S. JOHNSON."

To which letter the defendant responded as follows (Rec., p. 120):

423 "June 24, 1902.

Garland S. Johnson, Schell City, Mo.

DEAR SIR: As you wrote us before the last day of grace expired for payment of the June call, policy No. 109854, we are warranted in extending the time of payment, and have given you until July 5th to renew the policy. If, therefore, you wish to remit us $75.05 on or before that date, the policy will be kept in force.

Yours truly,

E. A. WRIGHT,
Chief Clerk."

Fourth. That Johnson never at any time offered or attempted to pay this assessment nor did he at any time offer to contribute one penny by way of subsequent dues or assessment during the following five years, although he was advised by the certificate that dues and assessments were payable quarter-annually on the first days of March, June, September and December of each year; and he had been paying his assessments and dues at these periods for fourteen years. Nor did he indicate by any act or word during the five years previous to his death that he considered said certificate as still being in force.

In the case of Konta v. Stock Exchange, 189 Mo. 26, in which

plaintiff sued for the reinstatement or restoration of his membership in a stock exchange on the ground that he had been unlawfully expelled therefrom by the defendant, the answer, among other things, alleged that the plaintiff had been legally suspended and expelled by reason of his failure to pay dues. The evidence showed that after plaintiff's expulsion from the exchange he did not
424 offer to pay any dues which accrued subsequently thereto and up to the time of the institution of this suit. This Court held that under these circumstances the plaintiff had abandoned his membership and acquiesced in his expulsion, and that, too, where it does not appear that defendant pleaded either an abandonment or an acquiescence in such forfeiture. The Court in this case says (l. c. 39):

"But even assuming, as contended by plaintiff, that Mr. Konta was a member of the St. Louis Stock Exchange, and that his expulsion was undoubtedly illegal, as it certainly was if he ever was a member of the exchange, he was bound, within a reasonable time after obtaining knowledge of such expulsion, to assert his rights; otherwise, he will be deemed to have consented to such expulsion, however illegal or irregular it may have been.

"In the case of Glardon v. Supreme Lodge Knights of Pythias, 50 Mo. App. 45, it is held that where a member was illegally expelled, it was incumbent upon him to affirm or disaffirm the act of expulsion within a reasonable time and in some distinct manner under the circumstances; and where he takes no steps of any kind to secure his reinstatement, allows dues to remain unpaid which had accrued and were payable prior to the date of expulsion, and neither tenders such dues nor any which accrued subsequently, he must be taken to have acquiesced in and consented to the sentence of expulsion."

How can the Court possibly reconcile its decision in this case with the decision in the case of Konta v. Stock Exchange?

425 If in the Lavin case (supra) it was declared as a matter of law that an insured had abandoned or acquiesced in a forfeiture of a certificate because of the fact that for a year following such forfeiture he never offered to pay anything on account of assessments during that period and did not otherwise take any action or perform any act which indicated that he still considered his certificate in force, and that, too, where he made a proper and legal tender of the amount of the assessment for the non-payment of which it was claimed that the certificate had lapsed, and in the Konta case (supra) that the plaintiff had abandoned his membership in a stock exchange and acquiesced in his expulsion therefrom where he failed to pay any dues during the period intervening between the date of his expulsion and the institution of suit, then why in the name of heavens shouldn't this Court here declare as a matter of law that the plaintiff can not recover because under the conceded and uncontradicted evidence it appears that the insured not only for one year, not only for two years, but for five years, not only did not pay or tender the amount of the assessment due June 1, 1902, but for five years did not offer to pay one penny by way of dues or assessments

under this contract nor indicate by an act or actions that he still considered this certificate in force. If this doesn't show a clear and unequivocal acquiescence in the forfeiture of the certificate for the non-payment of the assessment due five years previous or an abandonment of the certificate justifying the peremptory instruction requested by the appellant at the close of this case, then a peremptory instruction is improper under any circumstances.

In conclusion, we respectfully submit, with all the force
426 and earnestness in our power, that the Court has gr-eviously erred in the opinion heretofore rendered, and we earnestly urge on behalf of some twenty-five thousand members of the Safety Fund Department, holding some forty-eight millions of dollars of insurance, upon which some twenty-five thousand families have been taught to rely as the fund which will come to them upon the death of the heads of these families, and whose interest in this insurance will be utterly destroyed if this opinion stands, and that, too, for the benefit of those members who have long ago dropped out of this organization and have made no contributions thereto for many years, that your Honors will carefully consider whether your decision is in conformity with the law and evidence in this case, and that if your Honors have any doubts in that regard you will give us another opportunity to argue this case. We are aware and appreciate that your Honors are already overburdened with work, and for that reason your disinclination to again entertain consideration of questions once passed upon, but if your Honors will keep in mind plainly that you are dealing with not merely the sum involved in this particular case, and that your decision if made final will open the door for endless litigation of similar character, the extent of which it is impossible to forecast, and the dire effects which an adherence to your former opinion will have upon the continued existence of this organization, we think you will conclude with us that the importance of this case justifies a further consideration and reargument of the same.

Respectfully submitted,

JONES, HOCKER, SULLIVAN & ANGERT,

Attorneys for Appellant.

427 And on the 7th day of June, 1917, a motion to transfer to Court en banc was filed by the Appellant in said cause in said Supreme Court, which said motion to transfer is in the following words and figures, to-wit:

428 In the Supreme Court of the State of Missouri, April Term, 1917.

No. 17399.

NANNIE M. JOHNSON, Respondent,

vs.

HARTFORD LIFE INSURANCE COMPANY, Appellant.

Appellant's Motion to Transfer to Court en Banc.

Now comes the appellant and moves the Court to transfer this cause to the court en banc, in accordance with the provisions of Section 4 of the Amendment of 1890 to Article VI of the Constitution of the State, which provides that when a federal question is involved a cause on the application of the losing party should be transferred to the court en banc, for the reason that the following federal
429 questions are involved in this cause:

1. The divisional opinion herein to the effect that the evidence in the record in this cause was sufficient to support the first instruction given by the trial court on plaintiff's behalf, which authorized or permitted the jury to find that the Safety fund of the Men's Division of the Safety Fund Department of the Hartford Life Insurance Company was in excess of one million dollars ($1,000,000.00), when the evidence did not justify a finding by the jury that said Safety Fund was in excess of one million dollars ($1,000,000.00), and, on the contrary, the undisputed and uncontradicted evidence herein shows that said Safety Fund was not in excess of one million dollars ($1,000,000.00), denies to the appellant company due process of law; and the judgment of this court in upholding said instruction and affirming the judgment of the trial court in favor of the plaintiff herein deprives the appellant (defendant below) of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The divisional opinion in holding that the charter of the appellant Company required that the Board of Directors of the appellant Company should have made and levied the assessment in controversy, and that this assessment levied against the insured was void or invalid because it was not made and levied by the Board of Directors but by the officers of the appellant Company, fails to give full faith and credit to a public act and record of the State of Connecticut, by and under which the appellant Company is incorporated
430 (to-wit, the legislative charter granted by the Legislature of the State of Connecticut), contrary to and in violation of Article IV, Section 1, of the Constitution of the United States, for the reason that there is no provision in said charter that said assessment or any assessments under certificates issued in the Safety Fund Department of the appellant Company shall be made and levied by

the Board of Directors of the appellant Company. The extent and character of the powers granted in said charter and by whom the acts and powers of the appellant Company may be exercised and performed on its behalf, and the extent to which the acts and powers of the appellant Company must or can only be exercised by its Board of Directors, and not by the officers of the appellant Company on its behalf, involves the question of the full faith and credit to be given to said charter as required by the Federal Constitution and under the provisions of Section 4 of the Amendment of 1890 to Article VI of the Constitution of Missouri, this question is determinable by the Court en banc.

3. The divisional opinion in holding that the appellant did not plead an abandonment of the certificate of membership in controversy by the insured denies to the appellant due process of law; and the judgment of this Court in affirming the judgment of the trial court in favor of the plaintiff and against the appellant deprives the appellant of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, for the reason that the appellant, in its answer filed in the trial court, did plead an abandonment of this cer-
431 tificate of membership by the insured, and the Court, in fail-
ing and refusing to give effect to or a consideration of this defense made by the appellant in its answer in the court below, deprives the appellant of its property without due process of law.

4. The divisional opinion, in failing to consider and pass upon the defense made by the appellant in its answer in the trial court that the insured acquiesced in the forfeiture of the certificate in question for the failure to pay the assessment in controversy, denies to the appellant due process of law; and the judgment of this Court in affirming the judgment of the trial court in favor of the plaintiff and against the appellant deprives the appellant of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, for the reason that this Court failed to consider, pass upon or decide a valid defense validly made by the defendant to the plaintiff's claim.

5. The Court failed and refused to give full faith and credit to the decree of the Superior Court of New Haven County, Connecticut, in the case of Dresser et al. v. Hartford Life Insurance Co. et al., contrary to and in violation of Article IV, Section 1 of the Constitution of the United States.

6. The judgment rendered by the court below and affirmed by the divisional opinion herein deprives the appellant of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States for the reason that the judgment of this Court is against the defendant, personally, whereas, the certificate sued on by the plaintiff herein
432 expressly provides that the amount payable thereunder shall
be paid out of the Mortuary Fund, of which the appellant is Trustee, and not otherwise; and the appellant being merely a Trustee of said Mortuary Fund, administering the same in accordance with

the provisions of the certificate sued on and under the supervision of the Courts of the State of Connecticut, there is no warrant in law for the rendition of a personal judgment against the appellant under the certificate in suit.

Respectfully submitted,

JONES, HOCKER, SULLIVAN & ANGERT,
Attorneys for Appellant.

433 And on the 16th day of July, 1917, there appears in the record of said Supreme Court of Missouri an order overruling the motion for rehearing and motion to transfer cause to the court en banc, which said order is in the words and figures following, to wit:

In the Supreme Court of Missouri, April Term, 1917.

July 16, 1917.

NANNIE M. JOHNSON, Respondent,

vs.

HARTFORD LIFE INSURANCE COMPANY, Appellant.

Now at this day, the Court having considered and fully understood the said appellant's motion for a rehearing herein, doth order that the said motion be, and the same is hereby overruled; and it is further ordered by the Court that appellant's motion to transfer this cause to the Court in Banc be, and the same is hereby overruled.

434 UNITED STATES OF AMERICA,
State of Missouri, ss:

I, Jacob D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the case of Nannie M. Johnson, plaintiff and respondent, vs. Hartford Life Insurance Company, defendant and appellant, including a full, true and complete copy of the appellant's statement, brief and argument, to which is attached a certified copy of the decree in the case of Charles H. Dresser, et al., vs. Hartford Life Insurance Company of Hartford, Connecticut, et al., rendered by the Superior Court of New Haven County, Connecticut, dated March 23, 1910, and including a certified copy of all record entries and opinion of the Kansas City Court of Appeals and record entries, orders and opinions of the Supreme Court of the State of Missouri in said cause as fully and completely as all of the foregoing matters appear of record in my office.

In testimony whereof, I have hereunto set my hand and attached the official seal of said Supreme Court of the State of Missouri at my office in the City of Jefferson this 12th day of October, A. D. 1917.

J. D. ALLEN,
Clerk of the Supreme Court
of the State of Missouri.

435 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Being informed that there is now pending before you a suit in which Hartford Life Insurance Company is appellant, and Nannie M. Johnson is respondent, No. 9402, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court of Henry County, State of Missouri, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States.

436 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of November, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

437 *Return to Writ of Certiorari.*

UNITED STATES OF AMERICA,
State of Missouri, ss:

In obedience to the command of the within writ of certiorari, and in pursuance to the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record filed with the petition for a writ of certiorari in the case of Nannie M. Johnson, Plaintiff and Respondent, vs. Hartford Life Insurance Company, Defendant and Appellant, No. 9,402, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the Supreme Court of the State of Missouri at office in the City of Jefferson City, Missouri, this 6th day of December, 1917.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

[Endorsed:] File No. 26,209. Supreme Court of the United States. No. 742, October Term, 1917. Hartford Life Insurance Company vs. Nannie M. Johnson. Writ of Certiorari.

438 In the Supreme Court of the State of Missouri.

No. 9402.

NANNIE M. JOHNSON, Plaintiff and Respondent,

vs.

HARTFORD LIFE INSURANCE COMPANY, Defendant and Appellant.

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the certified transcript of record prepared by the Clerk of the Supreme Court of Missouri and filed with the petition for the writ of certiorari, and now on file in the office of the Clerk of the Supreme Court of the United States, shall stand as the return of said Clerk of the Supreme Court of Missouri to the writ of certiorari, without the preparation of another transcript, and to this end it shall only be necessary for said Clerk to transmit to the Clerk of the United States Supreme Court a certified copy of this stipulation as his return to the writ of certiorari.

(Signed) CHARLES W. GERMAN,
Attorneys for Plaintiff and Respondent.

(Signed) JONES, HOCKER, SULLIVAN & ANGERT,
Attorneys for Defendant and Appellant.

(Signed) PEYTON A. PARKS,
M. A. FYKE,
Of Counsel.

Endorsed: Filed December 4, 1917.

UNITED STATES OF AMERICA,
State of Missouri, ss:

I, Jacob D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the above and foregoing is a
439 full, true and complete copy of the stipulation of the parties as to return to be made to the writ of certiorari in the case of

Nannie M. Johnson, Plaintiff and Respondent, vs. Hartford Life Insurance Company, Defendant and Appellant, No. 9,402, as fully and completely as said stipulation remains on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Missouri, at my office in the city of Jefferson City, Missouri, this 6th day of December, A. D. 1917.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

440 File No. 26209. Supreme Court U. S., October term, 1917. Term No. 742. Hartford Life Insurance Company, petitioner, vs. Nannie M. Johnson. Writ of certiorari and return. Filed December 10, 1917.

[illegible]

OCTOBER TERM, 1917.

No. . . . . . .

HARTFORD LIFE INSURANCE
COMPANY,

Petitioner,

vs.

HARRIE M. JOHNSON,

Respondent.

NOTICE OF PETITION FOR WRIT OF CERTIORARI, PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

JAMES C. JONES,
GEO. F. HAID,
JAMES C. JONES, JR.,
Counsel for Petitioner.

St. Louis Law Printing Co., [illegible]

INDEX.

LIST OF AUTHORITIES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. ....

HARTFORD LIFE INSURANCE COMPANY, *Petitioner.*

vs.

NANNIE M. JOHNSON, *Respondent.*

NOTICE OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To Nannie M. Johnson, Respondent, and to Messrs. Fyke & Snider, Her Attorneys of Record:

Please take notice that on Monday, November 5, 1917, or as soon thereafter as counsel can be heard, we will present to the Supreme Court of the United States at Washington, D. C., a petition for a writ of *certiorari* in the above-entitled matter, to be directed

to the Supreme Court of the State of Missouri, a copy of which petition and brief in support thereof is furnished you herewith.

Dated this, the thirteenth (13th) day of October, A. D. 1917.

James C. Jones,
Geo. F. Haid,
James C. Jones, Jr.,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. ....

HARTFORD LIFE INSURANCE COMPANY,
Petitioner,
vs.
NANNIE M. JOHNSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes your petitioner, Hartford Life Insurance Company, a corporation, and makes this, its petition for a writ of *certiorari* to the Supreme Court

of the State of Missouri, and in support thereof respectfully states:

This suit, which was begun by petition filed in the Circuit Court of Henry County, State of Missouri, on December 27, 1907, was one by the beneficiary named in a policy or certificate of membership issued by the petitioner herein to the insured, who was the husband of the respondent. The controversy involved the same kind of contract that was in issue before this Court in the case of Hartford Life Insurance Company v. Ibs, 237 U. S. 662. The defense here and there was that the policy had become forfeited by nonpayment of an assessment due and payable under its terms. Here, as there, the beneficiary of the policy contended that the assessment was excessive and, therefore, void. In the present case the insured failed to pay an assessment levied May 2, 1902, and payable June 1, 1902, and died January 15, 1907, not having paid anything on account of the policy sued on during the five years intervening between the payment of the assessment levied prior to the one in question and the date of his death.

From a judgment for respondent in the trial court an appeal was prosecuted by petitioner to the Kansas City Court of Appeals, which court, upon the filing of a dissenting opinion by one of the Judges thereof, transferred the case to the Supreme Court of the State

of Missouri, which last-named court was the highest court of the State in which a decision in the suit could be had and the judgment of which court in this case is final.

That on or about the nineteenth (19th) day of October, 1906, there was filed in the Superior Court of New Haven County, Connecticut, a bill of complaint by Charles H. Dresser and others, certificate holders, against the Hartford Life Insurance Company and others, to which cause the insured James T. Johnson was a party by representation; that in said cause there was in question, among other things, the validity of all of the assessments made by the Hartford Life Insurance Company prior to the date of the filing of said bill of complaint on October 19, 1906, and the validity of all such assessments was adjudicated in favor of the Hartford Life Insurance Company; that on the twenty-third (23rd) day of March, 1910, a final decree or judgment was entered by the said Superior Court of New Haven County, Connecticut, in said cause of Charles H. Dresser *et al.* v. Hartford Life Insurance Company *et al.*, which decree was subsequent to the entry of the judgment by the Circuit Court of Henry County, Missouri, entered in the case at bar on May 12, 1909, and while the same was pending upon appeal in the Kansas City Court of Appeals; that your petitioner attached and filed with its brief in this cause while the same was pending on

appeal in the Kansas City Court of Appeals a certified copy of the decree of the Superior Court of New Haven County in said cause of Dresser *et al.* v. Hartford Life Ins. Co. *et al.* in which brief it asserted its rights, privileges and immunities growing out of said decree of the Superior Court of New Haven County, Connecticut, and contended that said decree was *res adjudicata* as to the issues in this cause; that said Kansas City Court of Appeals considered said decree, but held that the same was not *res adjudicata* as to the issues in this cause and was not binding upon the insured or his beneficiary, which holding is contrary to the decision of this Court in the case of Hartford Life Insurance Co. v. Ibs, 237 U. S. 662; that after the transfer of such cause from the Kansas City Court of Appeals to the Supreme Court of the State of Missouri the latter court held that the decree of the Superior Court of New Haven County, Connecticut, was not binding upon it because the same was not rendered by the Connecticut court until after the trial in this cause was had and while the same was pending on appeal and therefore was not the subject of review by that court.

Petitioner further states that the decision and judgment of the Supreme Court of the State of Missouri denied to it a title, right, privilege or immunity

claimed under the Constitution of the United States, in the following particulars, to wit:

I.

The Supreme Court of Missouri, contrary to and in violation of Article IV, Section 1, of the Constitution of the United States, failed and refused to give full faith and credit to the judgment and decree of the Superior Court of New Haven County, Connecticut, in the case of Charles H. Dresser *et al.* v. Hartford Life Insurance Company *et al.*, in this: that the Supreme Court of Missouri holds that the Mortuary Fund of the Men's Division of the Safety Fund Department could not be replenished by assessments based upon death losses not previously assessed for at the time the assessments are levied, which, in effect, amounts to a holding that it was unlawful and illegal for petitioner to maintain a Mortuary Fund for the payment of death losses, whereas, not only the certificate in suit provides that assessments shall be levied against the members of this department to form a Mortuary Fund and from time to time to replenish said Mortuary Fund, from which fund all death losses are payable under the provisions of the certificate of membership in suit, but the Court of Connecticut, by its judgment and decree in the case of Charles H. Dresser *et al.* v. Hartford Life Insurance

Company *et al.*, held and adjudged that it was reasonable and proper for petitioner to maintain such Mortuary Fund for the payment of death losses and to replenish said fund from time to time by assessments based upon death losses not previously assessed for at the time of such assessment, and also that it was proper and lawful for petitioner to maintain and keep in said Mortuary Fund for the payment of the death losses in said department an amount not exceeding the average quarterly assessment for the preceding year. The average quarterly assessment for the year preceding the assessment in question amounted to a sum in excess of three hundred thousand dollars ($300,000.00), whereas, at the time of the assessment in question, there was only forty-seven thousand four hundred sixty-two dollars and seventeen cents ($47,462.17) in said Mortuary Fund.

II.

The Supreme Court of the State of Missouri, contrary to and in violation of Article IV, Section 1, of the Constitution of the United States, failed and refused to give full faith and credit to the judgment and decree of the Superior Court of New Haven County, Connecticut, in the case of Charles H. Dresser *et al.* v. Hartford Life Insurance Company *et al.*, in this: That notwithstanding the fact that the Supe-

rior Court of New Haven County, Connecticut, found and decreed that "the Hartford Life Insurance Company did not levy assessments unnecessary in amount or number", which finding and decree was made prior to the decision of the Supreme Court of the State of Missouri in this cause, said last-named Court holds that said assessment was illegal and void and that the failure of the insured to pay the same did not preclude recovery upon the policy or certificate of insurance sued upon.

III.

The Supreme Court of Missouri, in its holding that there was evidence in the record herein that at the time of the levy of the assessment in question there was in excess of one million dollars ($1,000,000) in the Safety Fund of the Men's Division of the Safety Fund Department, and that, therefore, an instruction given by the trial court authorizing the jury to find that the assessment in question was illegal and void if they found that the amount in the Safety Fund of the Men's Division of the Safety Fund Department was in excess of one million dollars ($1,000,000), was proper, denies to the petitioner due process of law and deprives it of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States,

for the reason that there is no evidence in the record that the Safety Fund of the Men's Division of the Safety Fund Department was in excess of one million dollars ($1,000,000) at the time the assessment in question was levied, or at any time, but, on the contrary, the undisputed and uncontradicted evidence shows that said Safety Fund was not in excess of one million dollars ($1,000,000) at the time said assessment was levied.

IV.

The Supreme Court of Missouri held that the charter of the petitioner required that the Board of Directors of the petitioner should make and levy the assessments under the certificate of membership issued herein, and that the assessment in controversy was null and void because it was not made and levied by the Board of Directors of petitioner, but by its officers, and thus said Supreme Court of Missouri failed and refused to give full faith and credit to a public act and record of the State of Connecticut, to wit, the legislative charter granted to petitioner by the Legislature of the State of Connecticut, contrary to and in violation of Article IV, Section 1, of the Constitution of the United States, for the reasons:

First. That the legislative charter granted to petitioner by the Legislature of the State of Connecticut

contains no requirement that assessments under the certificates of membership issued by petitioner should be made and levied by its Board of Directors; and,

Second. That, even if the charter of petitioner required that assessments under its certificate of membership should be made and levied by the Board of Directors, such power could be delegated by the Board of Directors to the officers of petitioner, and that such power was delegated by the Board of Directors of petitioner is established by the undisputed and uncontradicted evidence in the record.

V.

The Supreme Court of Missouri, in its holding that petitioner did not plead an abandonment by the insured of the certificate of membership in suit, deprives petitioner of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, for the reason that petitioner did plead an abandonment by the insured of the certificate in suit in its answer to plaintiff's petition in the trial court, and the Supreme Court of Missouri, in its failure and refusal to give effect to, or consideration of, such defense made by petitioner in its answer deprives petitioner of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

VI.

The Supreme Court of Missouri, in its failure and refusal to consider and pass upon the defense made by petitioner in its answer filed in the trial court, that the insured, under the certificate of membership in suit, acquiesced in the forfeiture of said certificate for failure to pay the assessment in controversy, denies to petitioner due process of law and deprives it of its property without due process of law.

VII.

The judgment rendered by the Supreme Court of Missouri against petitioner deprives petitioner of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, for the reason that the judgment of said Supreme Court of Missouri is against petitioner in its corporate capacity, whereas the certificate of membership sued on herein expressly provides that the amount payable thereunder shall be paid out of the Mortuary Fund, of which petitioner is trustee, and not otherwise, and petitioner, being merely a trustee of said fund, administering the same according to the provisions of the certificate of membership sued on herein and under the provisions of the decrees of the courts of the State of Connecticut, there is no warrant in law for the rendition of a per-

sonal judgment against the petition under the certificate sued on.

VIII.

The Supreme Court of Missouri, contrary to and in violation of Article IV, Section 1, of the Constitution of the United States, failed and refused to give full faith and credit to the judgment and decree of the Superior Court of New Haven County, Connecticut, in the case of Charles H. Dresser *et al.* v. Hartford Life Insurance Company *et al.*, in this: that the Supreme Court of Missouri holds that at the time the assessment in question was levied there was an excess of one million dollars ($1,000,000.00) in the Safety Fund of the Men's Division of the Safety Fund Department, whereas in said case of Charles H. Dresser *et al.* v. Hartford Life Insurance Company *et al.*, the Connecticut Court expressly found, adjudged and decreed that at the time of the levy of the assessment in question there was not in excess of one million dollars ($1,000,000.00) in the Safety Fund of the Men's Division of the Safety Fund Department of petitioner.

IX.

The holding and judgment of the Supreme Court of Missouri that the assessment in question was illegal because at the time of the levy thereof there was

in excess of one million ($1,000,000.00) dollars in the Safety Fund of the Men's Division of the Safety Fund Department, deprives petitioner of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Federal Constitution, for the following reasons:

First. Because neither the amount nor the validity of the assessment, under the terms of the certificate of membership or policy sued on, is dependent in any way upon the amount in the Safety Fund of the Men's Division of the Safety Fund Department; and

Second. Because the Safety Fund of the Men's Division of the Safety Fund Department is not under the control or in the possession of petitioner, but is under the sole and exclusive control and supervision of the Security Company of Hartford, Connecticut, and is being held and administered by that company as Trustee under the terms of a trust agreement, a copy of which it attached to and made a part of the certificate or policy sued on, and under the supervision of the Courts of the State of Connecticut, and if, as the Supreme Court of Missouri holds, there was evidence tending to show that said Safety Fund was in excess of one milliom doilars ($1,000,000.00) at the time of the levy of the assessment in question, it was because of no fault on the part of petitioner and does not justify the holding of the Supreme Court of Missouri that the assessment was illegal for that reason.

X.

The holding and judgment of the Supreme Court of Missouri in affirming an instruction of the trial court which told the jury, among other things, that the assessment was illegal if they found from the evidence that at the time of the levy of the assessment in question there was a "surplus" in the Mortuary Fund of the Men's Division of the Safety Fund Department, deprives petitioner of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States for the reason that there is no evidence that there was any surplus in said Moruary Fund at the time of the levy of the assessment in question and the jury was not told or instructed by the trial court what would constitute a "surplus" in said Mortuary Fund.

Your petitioner has filed herewith a duly certified transcript of the record in the Supreme Court of Missouri, which it prays may be considered in connection with this petition as if made a part thereof.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court to the Supreme Court of the State of Missouri, requiring and directing the said Supreme Court of the State of Missouri by a date certain to be designated therein, to certify and send to this Honorable Court a full, true and complete tran-

script of the record and proceedings in the case of Nannie M. Johnson, plaintiff and respondent, v. Hartford Life Insurance Company, defendant and appellant, said cause being No. 17,399 upon the docket of said Supreme Court of the State of Missouri, to the end that the said cause may be reviewed and determined by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with law, and that the said judgment of the said Supreme Court of the State of Missouri in the said case may be reversed by this Honorable Court.

And your petitioner will forever pray.

HARTFORD LIFE INSURANCE COMPANY,
Petitioner.

By James C. Jones,
Geo. F. Haid,
James C. Jones, Jr.,
Counsel for said Petitioner.

State of Missouri, }
City of St. Louis. } ss.

James C. Jones, Jr., being duly sworn, says that he is one of the counsel for the Hartford Life Insurance Company, the petitioner in the foregoing petition for a writ of *certiorari*; that he prepared the foregoing petition and the allegations contained therein are true as he verily believes.

JAMES C. JONES, JR.

Subscribed and sworn to before me by James C. Jones, Jr., this 12th day of October, A. D. 1917.

My commission expires March 3, 1919.

Edward W. Lake,

(Seal) *Notary Public within and for the City of St. Louis, Missouri.*

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. ....

HARTFORD LIFE INSURANCE COMPANY,

Petitioner,

vs.

NANNIE M. JOHNSON,

Respondent.

BRIEF IN SUPPORT FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The case involves substantially the same questions that were before this Court in the case of Hartford Life Insurance Company v. Ibs, 237 U. S. 662, but it also contains some questions which were not before this Court for consideration in that case.

This is a suit based on the same kind of policy and against the same company.

The defense here, as there, was that the policy had become forfeited by the non-payment of an assessment due and payable under its terms.

Here, as there, the beneficiary of the policy contended that the assessment was excessive and therefore void, and here, as there, it is asserted that this question was determined by the decree of the Connecticut Court in the case of Dresser *et al.* v. Hartford Life Insurance Company *et al.*, and that the beneficiary was bound by that decree. There is this difference in the two cases, however: In the Ibs case the decree of the Connecticut Court in the Dresser case was offered in evidence at the trial of that case, whereas in the case at bar that decree was not offered in evidence at the trial for the reason that it was not rendered until after the trial of this cause and while the same was pending on appeal in the Kansas City Court of Appeals. Promptly, however, after the entry of the Dresser decree by the Connecticut Court, your petitioner attached and filed a certified copy of that decree with its brief in the Kansas City Court of Appeals and asserted in that court that said decree was determinative of the issues of this case. The Kansas City Court of Appeals in its opinion considered this decree, but, contrary to the ruling of this Court in the Ibs case, *supra*, held that

said decree was not determinative of the issues in this case because the two cases

> **"are not identical in parties, cause of action or decisive issues. Plaintiff was not a party to that suit," etc.**

Because of the dissent of one of the Judges of the Kansas City Court of Appeals from the majority opinion of that court, this cause was transferred, in accordance with the practice in Missouri, to the Supreme Court of that state.

The Supreme Court of Missouri in its opinion holds that the Dresser decree is not open to review in this case because it was not rendered until after the trial of this cause and was not pleaded or offered in evidence in the trial court.

ARGUMENT.

The Supreme Court of Missouri, in violation of Article IV, Section 1, of the Constitution of the United States, refused to give full faith and credit to the decree of the Connecticut Court in the Dresser case.

It was held by this Court in Hartford Life Insurance Company v. Ibs., 237 U. S. 662, that the beneficiary under a similar policy and in a similar action was bound by the decree of the Connecticut Court in the Dresser suit because "she was in privity with her husband," the insured. In so far as concerns the issues involved in the present case, it was adjudged by the decree of the Connecticut Court in the Dresser case as follows:

1. That your petitioner could lawfully maintain a Mortuary Fund for the payment of death losses and replenish the same at stated intervals from the proceeds of assessments levied against its certificate holders and that your petitioner could lawfully maintain in that fund, for the payment of all death losses, an amount not exceeding the average quarterly assessment for the preceding year.

2. That all the assessments levied by your petitioner under certificates issued in this department prior to the filing of the bill of complaint in the

Dresser suit on October 19, 1906, and which includes the assessment in controversy, levied May 2, 1902, were not excessive, but were valid and lawful. It said:

> "It was claimed by the plaintiffs that the defendants were levying assessments unnecessary in amount and number for their own wrongful purposes. The Hartford Life Insurance Company levied the assessments provided for in the plan and in the certificate above set forth, quarterly, and the proceeds of such assessments when received by said Insurance Company were paid into and credited to the Mortuary Fund described in the contract of insurance. **The Hartford Life Insurance Company did not levy assessments unnecessary in amount or number.**"

(See Dresser Decree, attached to "Appellant's Statement, Brief and Argument", in the Kansas City Court of Appeals, Record, p. 322).

3. Prior to the institution of the bill of complaint in the Dresser suit on October 14, 1906, the amount in the Safety Fund of the Men's Division of the Safety Fund Department did not exceed the sum of one million dollars ($1,000,000.00). In referring to the amount maintained in that Fund by the Security Company, the trustee thereof, the Connecticut Court said:

> "It never accumulated a fund of one million dollars ($1,000,000.00) par value of United States bonds, although it did accumulate a fund which, in June, 1894, amounted to one million dollars ($1,000,000.00)."

The Supreme Court of Missouri in the case at bar holds directly contrary to the Connecticut Court in the Dresser case, as follows:

1. That the assessment in controversy, levied May 2, 1902, was excessive and illegal because

2. There was an excess of one million dollars ($1,000,000.00) in the Safety Fund at the time of its levy; and,

3. It was levied for the purpose of paying future death losses.

In other words, the Connecticut Court found and adjudged the assessment in question was not excessive, but was valid and legal, whereas the Missouri Court holds that it was excessive and void; the Connecticut Court found and adjudged that the amount in the Mortuary Fund of the Men's Division of the Safety Fund Department did not exceed the sum of one million dollars ($1,000,000.00) at the time this assessment was levied, whereas, the Missouri Court holds that that fund at that time was in excess of one million dollars ($1,000,000.00), and, whereas, the Connecticut Court found and adjudged

that it was lawful for your petitioner to maintain a Mortuary Fund for the payment of death losses and that all assessments, including the assessment in question, were levied to replenish said Mortuary Fund, from which fund the death losses were paid, the Missouri Supreme Court, on the contrary, holds and adjudicates that the assessment in question was levied to pay future death losses and was, therefore, illegal and void.

While the Missouri Supreme Court, in its opinion in this cause, recognizes that its holding herein is contrary to the Dresser decree and that a similar ruling by the Supreme Court of Minnesota in the Ibs case was later reversed by this Court for the failure of the Minnesota Court to give full faith and credit to that decree, the Missouri Court holds, however, that the Dresser decree, not having been rendered until after the trial of this cause, and not having been pleaded or offered in evidence in the trial court, was not entitled to full faith and credit and was not binding upon that court. It is true, as stated by the Missouri Supreme Court in its opinion, that the Dresser decree was not pleaded or offered in evidence at the trial of this cause because that decree was not entered by the Connecticut Court until after an appeal of this case had been perfected to the Kansas City Court of Appeals; but promptly upon the rendition of that decree a certified copy thereof was

filed in the Kansas City Court of Appeals, and the same was before that Court for consideration and was considered by that Court, as is manifest from its opinion in this cause.

If the defendant in error was bound by that decree and the same was determinative of the issues in this case, and it was so held by this Court in the Ibs case, then we assert that the same was entitled to full faith and credit, even though it was rendered and brought forward for the first time while this cause was pending in the Kansas City Court of Appeals.

We believe, after a careful examination of the authorities, that this case is one of first impression on the question of the binding effect of a judgment entered subsequent to the trial of another action and while the latter is pending on appeal, which judgment, had it been entered prior to the trial of said action, would have been *res adjudicata* as to the issues there involved. On principle it would seem that such a judgment should be entitled to full faith and credit immediately upon its entry.

Suppose that a beneficiary under a policy, living in Illinois, should bring an action on the policy in that state and judgment should be entered by the trial court in favor of the defendant, from which judgment the beneficiary should perfect an appeal to the Supreme Court of Illinois, and pending such appeal should institute another action on the policy in the

State of Missouri and should recover a judgment for the amount thereof in the Missouri court, and pending the appeal by the defendant from the judgment of the Missouri court in favor of the plaintiff, the Illinois Supreme Court should affirm the judgment of the trial court of that state in favor of the defendant, could it be contended under such circumstances that the Illinois judgment should not be entitled to full faith and credit in the Missouri court because it was not rendered until after the trial of the Missouri case was had and that the Missouri Appellate Court could disregard the Illinois judgment and affirm the judgment of the Missouri trial court in favor of the beneficiary? We think not. And that is precisely the case we have here.

The nearest case which we have been able to find on this question is Jenkins v. International Bank, 127 U. S. 484, 488. In that case, after the trial was had, but while the trial court still retained jurisdiction, a judgment was entered in another action which was determinative of the issues there involved. The complainant thereupon filed a supplemental bill in the trial court, setting forth the judgment in the latter action, and it was held by this Court that this judgment was entitled to full faith and credit, even though it was rendered subsequent to the trial of the other action. The only difference between the Jenkins case and the case at bar is that in the Jenkins case the sec-

ond judgment was brought forward after the trial of the case, but while the trial court still retained jurisdiction of the action, whereas in the case at bar the second judgment was brought forward while the first action was pending on appeal and the trial court had lost all jurisdiction. As the trial court had then lost all jurisdiction of the cause, your petitioner could not bring forward the Dresser decree in a supplemental bill in the trial court, as was done in the Jenkins case. If, however, the judgment in the Jenkins case was entitled to full faith and credit, even though it was brought forward after the trial of the first action but while the trial court still retained jurisdiction, there would seem to be no good or plausible reason why such a judgment should not be entitled to full faith and credit in the court which then has jurisdiction of the cause, even though such court is one of appellate jurisdiction.

II.

The judgment of the Supreme Court of Missouri deprives the plaintiff in error of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

Under the terms of the certificate in suit it is provided that when the amount of the Safety Fund of the Men's Division of the Safety Fund Department of

your petitioner reaches the sum of three hundred thousand dollars ($300,000.00) the income therefrom, and when the sum reaches the sum of one million dollars ($1,000,000.00) both the income and all further contributions thereto shall be turned over to your petioner by the Security Company to be applied in reduction of the assessments of the certificate holders in this department. The Supreme Court of Missouri, in its opinion in this cause, holds that the record evidence was sufficient to justify a finding of the jury that at the time of the lapse of the assessment in question there was one million one hundred seventy-six thousand five hundred sixty-one dollars and twenty-five cents ($1,176,561.25) in that fund. The holding of that Court to this effect is absolutely and entirely without foundation or support in the evidence and, on the contrary, is directly opposed to the undisputed and uncontradicted evidence, which shows that the amount in the Safety Fund of the Men's Division of the Safety Fund Department was not in excess of one million dollars ($1,000,000.00) at the time this assessment was levied. The only evidence which the Missouri Supreme Court cites in support of this holding is an item contained in the annual report filed by your petitioner with the Insurance Department of Missouri for the year ending December 31, 1902, and which item is as follows:

"Net Safety Funds.............$1,176,561.25"

The uncontradicted and undisputed testimony of both the officials of your petitioner and of the Security Company, the trustee of the Safety Fund, as well as the books and records pertaining to said fund, established absolutely and unequivocally that the amount, one million, one hundred seventy-six thousand, five hundred sixty-five dollars and twenty-five cents ($1,176,565.25) as the "Net Safety Funds" stated in the foregoing report was the aggregate amount of two (2) Safety Funds, the Safety Fund of the **Men's** Division and the Safety Fund of the **Women's** Division of the Safety Fund Department of the petitioner, that on December 31, 1902, the amount in the Men's Safety Fund was one million dollars ($1,000,000), and the amount in the Women's Safety Fund was one hundred seventy-six thousand, five hundred sixty-one dollars and twenty-five cents ($176,561.25). The unequivocal and undisputed evidence also shows that the Men's Division of the Safety Fund Department and the Women's Division of the Safety Fund Department were separate and independent divisions established at different times, the certificates issued in the two departments containing different provisions, the funds in each department were kept separately, the assessments payable by the members under the certificates in the two departments being different, the provisions of the trust agreements pertaining to the Safety Funds in the two departments

and the manner and method of their administration and distribution by the Security Company as Trustee being different, and the two divisions operated and maintained as separate and distinct entities.

Furthermore, the aforementioned report filed by your petitioner with the Missouri Insurance Department does not designate the amount above referred to, one million, one hundred seventy-six thousand, five hundred sixty-one dollars and twenty-five cents, ($1,176,561.25) as the amount in the Safety Fund of the Men's Division of the Safety Fund Department, but as "Net Safety Funds", which shows conclusively that there was more than one Safety Fund therein referred to. The holding of the Supreme Court of Missouri, therefore, that the jury was authorized to find from this report that there was in excess of one million dollars ($1,000,000.00) in the Safety Fund of the Men's Division of the Safety Fund Department at the time this assessment was levied when the uncontradicted and undisputed evidence shows that the amount of the Men's Safety Fund was only one million dollars ($1,000,000.00) and that the amount stated in this report was the aggregate amount of both the **Men's** Safety Fund and the **Women's** Safety Fund is in effect a ruling that the jury may find that **two** is **not two**, but **one**. The jury may find either way when there is some evidence to support their finding, but to support a jury's finding and base a judgment

thereon when the finding is one way and all the evidence is the other way, is to deprive a defendant of its property without due process of law. A party against whom a judgment has been rendered which is without support or foundation in the evidence may have had **some** process of law under such circumstances, but he certainly can not be said to have had **due** process of law.

In Chicago, Burlington, Etc., Ry. Co. v. Chicago 166 U. S. 226, 234, this Court, on a writ of error to the Supreme Court of Illinois, in holding that the plaintiff in error had been deprived of its property without due process of law by a verdict of the jury and a judgment entered in pursuance thereof, in which the plaintiff in error was awarded the sum of $1.00 in proceedings for the condemnation of certain of its property, when the evidence established that the value of said property was in excess of that awarded by the jury, says:

> "Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this Court has said that a trial in a court of justice according to the modes of proceeding applicable

to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant having fall opportunity to be heard—met the requirement of due process of law (United States v. Cruikshank, 92 U. S. 542, 554; Leeper v. Texas, 139 U. S. 462, 468). But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the **letter of the statute** prescribing forms of procedure in the courts and give the parties interested the **fullest opportunity** to be heard, and yet it might be that its **final action** would be **inconsistent with that amendment.** In determining what is due process of law regard must be had to **substance,** not to **form.** This Court, referring to the Fourteenth Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the **prohibition** to the states is of no **avail,** or has no application where the invasion of private rights is affected under the **forms** of state legislation' (Davidson v. New Orleans, 96 U. S. 97, 102). **The same**

question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."

III.

The Supreme Court of Missouri, contrary to Article IV, Section 1, of the Constitution of the United States, failed to give full faith and credit to the legislative charter granted to your petitioner by the Legislature of the State of Connecticut.

The charter of the plaintiff in error, which is in evidence in this cause, was granted by the General Assembly of the State of Connecticut in the year 1866 and contains the following provision:

> "All the affairs of said corporation shall be managed and controlled by a board of not less than seven directors (the number of said directors to be determined by the by-laws of said company)."

The evidence in this cause shows that the assessment in question (as well as all previous assessments) was made and levied by the president and secretary of your petitioner. The Supreme Court of Missouri, in this cause, following and relying upon its previous decision in the case of Barber v. Hartford Life Insur-

ance Company, 187 S. W. 867 (not yet officially reported), which case is now pending on writ of error in this Court, holds that under this provision of its charter the officers of the plaintiff in error were without power to make and levy the assessment in question; that such power resided exclusively in the Board of Directors and could not be delegated to the officers of your petitioner.

The charter in question being a legislative charter granted by the Legislature of the State of Connecticut, is a public act or record of that state (Terry v. Merchants & Planters Bank, 66 Georgia 177-178; Lassly v. Fountain, 4 Hening & Mumford, 146), and is entitled to full faith and credit under Article IV, Section 1, of the Constitution of the United States; therefore, the question whether or not under the quoted provision of this charter, the exclusive power to make and levy these assessments, is vested in the Board of Directors, or whether such power is one which can be delegated to the officers, is one for determination by this Court.

In this connection, the Court, in Great Western Telegraph Co. v. Purdy, 162 U. S. 330-334, in holding that it was within its province to determine the effect of an order or judgment of the State of Illinois to which the plaintiff in error claimed the Supreme Court of Iowa had failed to give full faith and credit, says:

> "The plaintiff relied on the order of assessment, made by a court of the State of Illinois, as a judgment of that Court, entitled to the **effect** of being conclusive evidence of the plaintiff's right to maintain this action against the defendant. The Supreme Court of the State of Iowa **denied** it that effect. The question whether that Court thereby declined to give full faith and credit to a judicial proceeding of a Court of another state, as required by the Constitution and laws of the United States, was necessarily involved in the decision.
>
> "This Court, therefore, has jurisdiction of the case, **but must judge for itself of the true nature and effect of the order relied on** (cases)."

The proposition itself that only the Board of Directors could make the levy is unsound. In all the cases relied upon by the Missouri Supreme Court in the case of Barber v. Hartford Life Insurance Co., *supra*, the certificate itself, the organic law of the Company or a statute **expressly** provided **that the assessment should be made by the Board of Directors.** There is no such provision either in the contract here involved, or in the charter of the Company. In the absence of such a provision either in the contract, charter or statute, it has been uniformly held that this power may be delegated to any officers of the

Company (see Fee v. National Ass'n, 110 Iowa 271; Conductors' Ass'n v. Birnbaum, 116 Pa. St. 565; Cooley's Briefs on Insurance, Vol. II, p. 1027).

We submit that the power to make and levy these assessments was one which was delegable by the Board of Directors, and that it was delegated in this case is established by the fact that all the assessments for many years preceding the assessment in question were made and levied by the officers and not by the Board of Directors (Martin v. West, 110 U. S. 7).

There are other matters in the opinion rendered by the Supreme Court of Missouri which call for consideration, but the scope of the present discussion is to show that the case is one for consideration by this Court and this, we believe, has been done.

JAMES C. JONES,
GEORGE F. HAID,
JAMES C. JONES, JR.,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

HARTFORD LIFE INSURANCE COMPANY,
PETITIONER,

VS.

NANNIE M. JOHNSON, RESPONDENT.

OBJECTIONS TO ISSUANCE OF WRIT OF CERTIORARI, WITH SUGGESTIONS AND BRIEF IN SUPPORT THEREOF.

CHARLES W. GERMAN,
Kansas City, Mo.,
Counsel for Respondent.

PEYTON A. PARKS, Clinton Mo.,
MATTHEW A. FYKE, Kansas City, Mo.,
Of Counsel.

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No. ....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

HARTFORD LIFE INSURANCE COMPANY, PETITIONER,

VS.

NANNIE M. JOHNSON, RESPONDENT.

I. OBJECTIONS TO ISSUANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the respondent in the above entitled cause and objects to the issuance of a writ of certiorari in said cause to the Supreme Court of the State of Missouri, and assigns the following reasons therefor, to-wit:

First. Because no constitutional questions are involved on which to base the issuance of the writ.

Second. Because no issue on constitutional questions now sought to be raised, was made by pleading at or before the trial of this cause in the *nisi prius* court.

Third. Because the petitioner did not promptly make application for the issuance of this writ upon the final decision of the cause by the Supreme Court of the State of Missouri.

II. STATEMENT OF THE CASE.

This suit, which was begun by petition filed in the Circuit Court of Henry County, State of Missouri, on December 27th, 1907, by the beneficiary named in a policy issued by the defendant company, petitioner herein, to the insured, who was the husband of the respondent. The defendant by its answer set up two defenses and none others:

(a) Forfeiture of policy on account of non-payment of assessment;

(b) Abandonment of the policy by the insured.

A trial was had in said court and cause with verdict and judgment in favor of the plaintiff in the Circuit Court of Henry County Missouri, on May 12th, 1909. No constitutional questions were pleaded or raised until in the motion for new trial and no other constitutional questions were raised or sought to be raised in said motion for a new trial, save the following grounds set up in the motion for new trial and found in paragraph 11 of said motion:

"Because, in admitting in evidence the reports made by the defendant to the Insurance Department and each of them, and in submitting this case to the jury upon issues which are not made by the pleadings, and in admitting evidence not relevant to the issues made by the pleadings, and in instructing the jury that they were authorized to find for the plaintiff upon proof and evidence not within the issues made by the pleadings, and by the verdict thereunder and the judgment on said verdict, the defendant was, and has been, and is being deprived of its property without due process of law, and denied the equal protection of the laws, contrary to the provisions and inhibition of the 14th amendment to the Constitution of the United States, and contrary to the provisions and inhibitions of Section 3, of Article II, of the Constitution of Missouri."

The other grounds and portions for new trial being formal in their nature and not presenting any constitutional questions. No effort was made by instruction or pleading upon the issue that the trial court should follow the decision of the courts of the State of Connecticut, and give full faith and credit to the decisions of that state.

From this judgment an appeal was taken by defendant and granted to the Kansas City Court of Appeals at the October Term, 1910, of said court. Neither in brief or oral argument at this time was the Dresser case referred to, nor was the constitutional questions that equal faith and credit should be given to the decisions of the courts of Connecticut sought to be raised in any way. On December 5th, 1910, the Kansas City Court of Appeals, by unanimous decision, affirmed the judgment of the trial court. A rehearing was granted on motion and

cause again argued at the October Term, 1911, of said Court of Appeals.

On June 17th, 1912, the judgment was for the second time affirmed by the Kansas City Court of Appeals; this time, however, by a divided court, one judge dissenting solely on the ground of abandonment of policy by assured. Thereafter this cause was, on account of such dissent, certified to the Supreme Court of this state, where it was affirmed on May 29th, 1917. Appellant filed motion for rehearing and to transfer cause to court *en banc* and both these motions were denied, both divisions of the Supreme Court having reached the same conclusions of law. Thereafter on August 2, 1917, the mandate of affirmant by the Supreme Court was certified down and filed in the trial court. Afterwards on October 2nd, 1917, application for a writ of error to the Supreme Court of the United States was made to and denied by the Chief Justice of the Supreme Court of the State of Missouri, and thereafter on October 13th, 1917, notice of the pending application for said writ was served on counsel for the respondents in said cause.

BRIEF AND ARGUMENT IN SUPPORT OF SUGGESTIONS IN OPPOSITION TO GRANTING THE WRIT.

I. The issue of the constitutional question in point I, page 7, application of petitioner, *i. e.*, "equal faith and credit" was not timely raised. The doctrine in this state is laid down as follows:

> "It must appear as a primary requisite that the questions were clearly presented in the record at the first opportunity afforded in the trial court."
>
> *Hartzler* v. *Met. St. Ry. Co.*, 218 Mo. 562.
> *Lohmeyer* v. *St. Cordg. Co.*, 213 Mo. 685.
> *State* v. *Gammon*, 215 Mo. 100.
> *Davidson* v. *Hartford Life Ins. Co.*, 151 Mo. App. loc. cit. 567.

This suit was begun in the Circuit Court of Henry County, Missouri, on December 27th, 1907. The Dresser case, as a friendly suit in the interest of the petitioner, was instituted in the Superior Court of New Haven County, Connecticut, on October 19th, 1906. Neither the insured nor the beneficiary in the policy now involved was a party to or had knowledge of the Dresser case and it is only claimed that they are bound as being "parties by representation" (page 5). Although petitioner had knowledge of the pendency and object of the Dresser case no reference was made to it in any wise in the trial court and no effort was made to raise the constitutional question of "equal faith and credit" in the trial court at any time.

When this cause was tried in the Circuit Court of Henry County, Missouri, an appeal was promptly taken and under the law their fixing of the amount as the basis, would have gone direct to the Supreme Court of the State of Missouri, and it is but fair to state that this cause was tried on the part of the defendant with the view of having the decision of the Kansas City Court of Appeals in *King v. The Hartford Life Insurance Company*, decided adversely to said company October 5th, 1908 (See 133 Mo. App. 612), overruled by the Supreme Court of this State.

However, owing to a change in the law pending the motion for new trial, the appeal again went to the Kansas City Court of Appeals and the case was then presented both by brief and oral argument in October, 1910, over seven months after the final decision of the Dresser case in the Supreme Court of Connecticut, which was entered on the 23rd day of March, 1910. No reference was made either in oral argument or by citation or brief to the Kansas City Court of Appeals to the Dresser case, and the constitutional question now presented in point 1, page 7, of petitioner was not raised in any way in the Kansas City Court of Appeals until the case was held, after rehearing was granted, as set forth in the statement of facts. We maintain, therefore, that this point is not good because of failure of the petitioner to present it at its first opportunity.

The Supreme Court of this state has further held that the cause must be disposed of an appeal upon the

same theory as that assumed at the trial by the parties and only those issues which were presented at the trial court will be considered in the appellate court.

> *Williams* v. *Lobban*, 206 Mo. 399.
> *McCune* v. *Goodwillie*, 204 Mo. 306.
> *Mosely* v. *Mo. Pac. Ry. Co.*, 132 Mo. App. 642.

The Supreme Court of the State of Missouri has further held that points not raised in the motion for new trial are not for review in appeal.

> *State* v. *Kyle*, 177 Mo. 659.

In the Dresser case the point was not presented to the courts of Connecticut that the assessments involved and adjudicated in the Dresser case were not made by the Board of Directors, while in the Missouri case here involved, this point was directly in issue and passed upon by the courts of Missouri with the uniform holding that such assessments should be made by the Board of Directors so that there is no failure of the courts of this state to give equal faith and credit in this regard to the holding of the State of Connecticut in the Dresser case. Moreover the judgment of the Supreme Court of Missouri is based partly, at least, on the ground that no legal assessment had been made, which holding raises no constitutional question.

> *Railroad* v. *Snell*, 193 U. S. 30.
> *Gayword* v. *Denny*, 158 U. S. 180.

II. Other constitutional questions alleged to be involved.

We shall not dignify these further contentions found in points 2-10 (pages 8-16) in petition for writ, or trespass further upon the time of court than to offer the following suggestions and citations:

(1) An erroneous decision of a State Court does not deprive a party of property without due process of law.

Central Land Co. v. Laidley, 159 U. S. 103.

(2) By due process is meant a regular course of proceedings affording interested parties an opportunity to appear and assert their rights.

Simon v. Craft, 182 U. S. 427.

(3) Due process does not necessarily mean judicial process, nor is the right to appeal essential to it.

Reetz v. Mich., 188 U. S. 505.
Public Cl. House v. Corgan, 194 U. S. 497.
Andrews v. Schwartz, 156 U. S. 272.
Davidson v. Hartford Life Ins. Co., 151 Mo. App. l. c. 564.

(4) An appellant can not give Supreme Court jurisdiction by simply alleging in his motion for new trial that if the judgment is permitted to stand he will be deprived of his property without due process of law.

Woody v. Ry., 173 Mo. 547.
Eccles v. Ry., 170 Mo. 432.

(5) The mere invoking of a provision of the Constitution, by a party to the suit, does not raise such question.

(6) The Supreme Court of the United States, while asserting its broad power of jurisdiction, has never felt authorized to interfere with the judgment of a state court so long as it has acted within the power of its jurisdiction.

Windsor v. *McVeigh*, 93 U. S. 274. Cited in *Davidson* v. *Hartford Life Ins. Co.*, 151 Mo. App. loc. cit. 564.

III. Conclusion.

From the foregoing, it follows, in our opinion, that all facts concerning the illegality of the assessment, the forfeiture based on non-payment of that one assessment, the death of the insured from unsound mind in asylum, are all foreign to the consideration of the pending petition. They have been heard, considered and adjudicated by courts having jurisdiction and in which the interests and rights of petitioner have been ably and fully defended.

Wherefore, it is prayed that the petition for the writ be denied.

CHARLES W. GERMAN,
Kansas City, Mo.,
Counsel for Respondent.

PEYTON A. PARKS, Clinton, Mo.,
MATTHEW A. FYKE, Kansas City, Mo.,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. [redacted] 291

HARTFORD LIFE INSURANCE COMPANY,
Petitioner,

vs.

NANNIE M. JOHNSON,
Respondent.

BRIEF OF PETITIONER IN ANSWER TO RESPONDENT'S OBJECTIONS TO THE ISSUANCE OF THE WRIT.

JAMES C. JONES,
GEORGE F. HAID,
JAMES C. JONES, JR.,
Attorneys for Hartford Life Insurance Company, Petitioner.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main [illegible].

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 742.

HARTFORD LIFE INSURANCE COMPANY,
Petitioner,

vs.

NANNIE M. JOHNSON,
Respondent.

BRIEF OF PETITIONER IN ANSWER TO RESPONDENT'S OBJECTIONS TO THE ISSUANCE OF THE WRIT.

I.

The opinion of the Supreme Court of Missouri in this case is based upon the previous opinion of the Supreme Court of Missouri in the Barber cases, which latter cases (Nos. 252, 253) are now under consider-

ation by this Court, argument and submission of which will be had on the same day that the application in this case is submitted to this Court.

As the Barber cases are decided, so should this case be decided.

II.

The fundamental underlying proposition decided in the Ibs case (237 U. S. 662) is that the question of the validity of the assessments, so far as the challenge of their validity is based upon the manner in which that fund is being administered in Connecticut, is a question for the determination of the Connecticut courts. Any attempt by the courts of other states to decide such question is a usurpation of the authority of the courts of Connecticut.

The defendant company is but a trustee of the funds in question, accountable, and already required to account, to the courts of Connecticut, as trustee.

The judgment in question requires this trustee to account in a foreign jurisdiction in a manner wholly at variance with the accounting heretofore required by the courts of Connecticut.

III.

The "full faith and credit" required by the Federal Constitution to be given to the judgment of sister states is a command directed to **all** courts.

The orderly proceedings of courts require that **existent** judgments of sister states, if relied upon, should be pleaded.

The Dresser judgment could not be pleaded prior to the rendition of the original judgment in this case because **non-existent**.

When the original judgment in this case was appealed from it was not a final judgment in the sense that the Missouri courts had lost control thereof. Indeed, the very purpose of the appeal was to **control** and, if necessary, **revise** the judgment of the trial court.

While the judgment was thus under the **control** of and subject to the revision by the appellate courts of Missouri, the Dresser judgment was formally brought to the attention of that Court, a copy thereof filed with the Appellate Court and that Court was besought to give full faith and credit to that judgment.

This the Appellate and Supreme courts refused to do, the Appellate Court on the ground that the respondent was not a party to and consequently was not bound by the Dresser judgment, and the Su-

preme Court because the Dresser judgment was not pleaded prior to judgment in the trial court.

The appellate courts, as well as the trial courts, are bound under the constitution to give full faith and credit to the judgment of sister states whenever such judgments are brought to their attention in a timely and orderly way. To hold otherwise is to place a limitation upon the provision of the constitution that does not exist in the constitution.

The only course that could be pursued in this case was pursued and the entire reasoning of this Court in Jenkins v. International Bank, 127 U. S. 484, 488, requires that the Dresser decree be given the same consideration in this case as would ordinarily be given to a previously rendered foreign judgment properly pleaded.

IV.

The answer in the case expressly alleged that the defendant had declared the forfeiture to the insured for the non-payment of the assessment and dues, and that the insured acquiesced therein for five years prior to his death—paying no premiums, dues or assessments—thereby bringing the issues squarely within the rule of the following cases decided by this Court:

Hill v. Mutual Life Insurance Co., 193 U. S. 551, 559;

Mutual Life Insurance Co. v. Phinney, 178 U. S. 327;

Mutual Life Insurance Co. v. Sears, 178 U. S. 345.

Yet the Supreme Court of Missouri holds that because the plea did not contain *eo nomine* the word "abandonment"—there was no plea of abandonment.

Under the code, only facts need be pleaded.

The allegation in the answer "that although the said James T. Johnson lived until the 15th day of January, 1907, or for nearly five years after the forfeiture of said policy, by reason of the non-payment of said assessment in July, 1902, he at no time considered said certificate or policy as in force, but at all times acquiesced in the forfeiture thereof, resulting from the non-payment of said mortality call or assessment", clearly constituted a plea of abandonment.

To deny the defendant a hearing on this defense was a denial of due process of law.

When the Supreme Court held that defendant had not pleaded a defense which plainly it had pleaded, it denied defendant any process of law. To hail one into court for a hearing and then to refuse to let him be heard, and, as a consequence, take from him his property, is just as much a denial of due process of law as to take from him his property without hailing him. Of what use to hail him and not hear him?

V.

The amount in the **Safety Fund** (not to be confused with the Mortuary Fund) in no way determines the validity of the assessments.

The Safety Fund is not held by the defendant. It has no control thereof. The Safety Fund is in the hands of the Security Company of Hartford—in nowise connected with the defendant.

Yet the assumed existence in that fund of an amount in excess of $1,000,000 (an assumption wholly unwarranted by the record—but wholly immaterial in this case, if such excess existed) is made a reason, in the instruction, for finding the assessment invalid.

To deprive one of his property on the finding of a fact (warranted or unwarranted by the proof) which affords no logical or legal reason for determining the question in issue is to deprive one of his property without due process of law. The finding as to the amount in the Safety Fund is just as immaterial in this case as would be a finding that the moon was or was not made of green cheese.

United States v. Cruikshank, 92 U. S. 542, 554;
Leeper v. Texas, 139 U. S. 462, 468;
Davidson v. New Orleans, 96 U. S. 97, 102.

VI.

Counsel for respondent suggest that the petition for writ of *certiorari* should not be granted because the application therefor was not **promptly** made. They do not contend that it was not made within the time provided by the statute.

The judgment of the Supreme Court of Missouri was entered May 29, 1917 (Rec., p. 374). Under the rules of that Court (Rule 21) the appellant (petitioner here) had ten days within which to file motion for rehearing and motion to transfer to court *en banc*. On June 7, 1917, and within the ten days allowed by the rules aforesaid, appellant (petitioner here) did file its motion for rehearing and motion to transfer to court *en banc* (Rec., pp. 391 and 427) and these motions were overruled on July 16, 1917 (Rec., p. 433).

The time, therefore, within which petitioner could file its petition for writ of *certiorari* in this court under the Act of September 6, 1916, was three months after July 16, 1917, while, as a matter of fact, its petition was served upon counsel for respondent on October 13, 1917, and was filed in this court on October 15, 1917.

As is said by this Court:

"The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the Court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of."

Aspen Mining & Smelting Co. v. Billings, 150 U. S., *l. c.* 36.

Respectfully submitted,

JAMES C. JONES,

GEORGE F. HAID,

JAMES C. JONES, JR.,

Attorneys for Petitioner, Hartford Life Insurance Company.

No. 291.

IN THE

Supreme Court of the United States

HARTFORD LIFE INSURANCE COMPANY,
PETITIONER,

VS.

NANNIE M. JOHNSON, RESPONDENT.

MOTION OF RESPONDENT TO QUASH WRIT OF CERTIORARI, TO DISMISS THE PETITION, OR TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF MISSOURI.

Matthew A. Fyke,
Kansas City, Mo.

Peyton A. Parks,
Clinton, Mo.

Attorneys for Respondent.

No. 291.

IN THE

Supreme Court of the United States

HARTFORD LIFE INSURANCE COMPANY, PETITIONER,

VS.

NANNIE M. JOHNSON, RESPONDENT.

NOTICE OF MOTION TO DISMISS OR AFFIRM.

To Messrs. James C. Jones, Geo. F. Haid and James C. Jones, Jr., Attorneys for Petitioner:

You are hereby notified that we shall file a motion to dismiss the petition, for writ of certiorari, or affirm the judgment of the Supreme Court of Missouri, in the above entitled cause, and that said motion will be submitted to the Supreme Court of the United States on Monday, the 3rd day of March, 1919.

MATTHEW A. FYKE, and
PEYTON A. PARKS,
Attorneys for Respondent.

Service of the foregoing notice, motion and brief, is hereby acknowledged this .... day of ...., 1919.

....

....
Attorneys for Petitioner.

The respondent, Nannie M. Johnson, respectfully moves the court to quash the writ of certiorari herein, or to dismiss the petition therefor, or to affirm the judgment heretofore rendered by the Supreme Court of Missouri, for the following reasons:

I.

This court has not jurisdiction hereof, because no constitutional provision of the United States is involved herein, nor is any federal question herein involved.

II.

No constitutional provision of the United States was raised in the trial court, nor was any such provision raised or decided by the trial court, nor was any provision of the Constitution of the United States nor any federal question raised in or decided by either said trial court or the Supreme Court of Missouri, nor was the decision of any constitutional provision of the United States or federal question necessary to a decision of said cause in said courts.

III.

No competent evidence was introduced by petitioner in either the trial court or the Supreme Court of Missouri of the rendition of the opinion or judgment of the Superior Court of Connecticut in the "Dresser" case.

MATTHEW A. FYKE, and
PEYTON A. PARKS,
Attorneys for Respondent.

In support of the foregoing motion respondent begs leave to submit the following suggestions, statement and authorities:

STATEMENT.

This action was commenced in the Circuit Court of Henry County, Missouri, on December 27, 1907. The petition is in the usual form in suits upon policies of life insurance.

In due time the defendant, petitioner here, filed its answer, pages 4 to 8, printed record.

The answer admitted the incorporation of defendant.

Admits that it executed and delivered the policy.

Admits that insured died February 15, 1907.

Admits that up to the time of his death insured complied with all the conditions in said contract except in the particulars "hereinafter affirmatively pleaded."

Admits that plaintiff was his wife and is now his widow.

Admits that since the death of insured plaintiff has complied with all the requirements required of her.

Admits that demand has been made.

Denies that the sum of five thousand dollars is due her.

Admits that a deposit of $50 was made by insured at the time said policy was issued.

Denies that the same was received by defendant and placed to the credit of insured, and denies that the same has been retained by defendant.

Denies that any interest has accrued thereon.

For affirmative defense defendant pleaded, in substance:

That on May 2, 1902, it made and levied against the insured a mortality call or assessment; that notice of said assessment was duly given insured, and that insured failed to pay said assessment, whereby said failure *ipso facto* terminated said certificate or policy.

Alleges that although insured lived until the 15th day of January, 1907, or nearly five years after the forfeiture of said policy, by reason of the non-payment of said assessment in July, 1902, he at no time considered said certificate or policy as in force, but at all times acquiesced in the forfeiture thereof resulting from the non-payment of said mortality call or assessment.

The answer further sets up a provision of the policy relative to the deposit of ten dollars with the trustee named in the contract, as a safety fund, etc., and that defendant has no possession or control thereof and never has had.

The reply was a general denial.

No statute of the State of Connecticut was pleaded, nor was any decision of any court of Connecticut pleaded.

The cause was tried in the Henry County Circuit Court on May 12th, 1909, upon the pleadings hereinabove set forth.

Verdict was rendered for plaintiff on May 13, 1909, defendant filed its motion for new trial (printed Record, 223). The 11th ground of said motion is as follows: "Because in admitting in evidence the reports made by

the defendant to the Insurance Department and each of them, and in submitting the case to the jury upon issues which are not made by the pleadings, and in instructing the jury that they were authorized to find for the plaintiff upon proof and evidence not within the issues made by the pleadings, and by the verdict thereunder, and the judgment on said verdict, the defendant was and has been and is being denied the equal protection of the laws, contrary to the provisions and inhibitions of the Fourteenth Amendment to the Constitution of the United States, and contrary to the provisions and inhibitions of Section 3, of Article II, of the Constitution of Missouri.

On the 13th day of September, 1909, said motion was overruled.

On September 13th, 1909, defendant was allowed an appeal to the Kansas City Court of Appeals. Under the Constitution of Missouri, the Kansas City Court of Appeals has no jurisdiction of causes involving a constitutional question—jurisdiction in such cases being vested only in the Supreme Court of Missouri. In due time the defendant, in October, 1910, filed its brief and argument in the Kansas City Court of Appeals, and the points relied upon are set forth on pages 240-243, printed record.

No reference whatever was made by defendant in its points (Assignments of Error) in that court, that any constitutional provision of either the United States or of Missouri, had been in any way violated or infringed upon. The only reference to the Dresser case is

under Point V of its brief, as follows: "There is no evidence tending to show what was Dr. Johnson's share of the assumed excess in the safety fund and mortuary fund, and it was error to permit the jury to find that his share of this supposed excess was sufficient to pay the amount of the premium due by Dr. Johnson.

Dresser v. Hartford Life (see copy of opinion in appendix to this Brief)."

The Kansas City Court of Appeals was not called upon to pass on any constitutional question, and of course did not pass on any such question. Under the settled law of Missouri, appellate courts can only review and pass on the record of the case as tried in the trial court. No evidence can be introduced in the Court of Appeals or Supreme Court in cases pending there on appeal.

The Kansas City Court of Appeals affirmed the judgment of the trial court; one of the judges dissented, and the case was certified as the Constitution of Missouri provides.

It was not certified because a constitutional question had been raised, but because the dissenting judge deemed the decision of the majority to be in conflict with a decision of the St. Louis Court of Appeals upon the question of abandonment. After defendant's original brief was filed in the Kansas City Court of Appeals it filed an additional and supplemental brief and argument, wherein it undertook to raise constitutional questions (printed Record, pages 296-297). In none of its briefs in the Kansas City Court of Appeals did defendant com-

plain that the court below had failed to give full faith and credit to any public act of the State of Connecticut. In Point IX, page 297, defendant said: "By the judgment appealed from the defendant is deprived of the protection of Art. II, Sec. 1 of the Constitution of the United States, which requires full faith and credit shall be given to the judicial proceedings of sister states." There is in the record nothing, aside from the motion for rehearing in the Supreme Court, and aside from the opinion of that court, to indicate what constitutional questions, if any, were presented to that court.

That court did not decide any constitutional question, but based its decision on questions of general law.

The only reference in the opinion to any federal question is the following (printed Record, page 323): "The case at bar was tried below on May 12, 1909—which was prior in time to the entering of the decree in the Dresser case, and record in the Dresser case was, therefore, not offered or presented in the trial of this case. Since the record of the Dresser case is in no manner properly raised or lodged in this case, we do not deem it to be within the scope of our review, and likewise the federal question based thereon—under such circumstances the rule announced by the Supreme Court of the United States in *Ibs v. Hartford Life Insurance, supra*, should not be applied in this case."

In this connection we call the court's attention to the fact that even if it had been competent to offer the judgment in the Dresser case in evidence, either in the Kansas City Court of Appeals or in the Supreme Court

of Missouri, it was not so certified as to be admissible. It is not certified as required by the Acts of Congress (see certificate, printed Record, page 235).

No public act of the legislature of Connecticut was offered in evidence, and no instructions were asked by the defendant in the court below as to the effect of any such act.

The only thing along that line introduced by defendant was extracts from the charter of defendant, which charter seems to have been granted by a resolution of the General Assembly of Connecticut (printed Record, page 95). When that charter was introduced defendant's counsel said to the court, the material thing in the charter, I call to Your Honor's attention is this: Section Six (printed Record, page 95).

That section does not bear upon the question as to how or by what authority assessments are to be levied. No by-laws upon that subject were introduced by defendant, and there is nothing in the charter introduced in evidence as to how or by what officer or officers assessments are to be levied, other than the following: "All the affairs of the company shall be managed and controlled by a board of directors."

POINTS AND AUTHORITIES.

It has been uniformly held by the Supreme Court of Missouri that to make it incumbent upon that court to pass upon a constitutional question, the question must have been raised in the trial court.

State v. *Cook*, 217 Mo. 326.
Shaw v. *Goldman*, 183 Mo. 461.
Ash v. *Independence*, 169 Mo. 77.
St. Joe v. *Ins. Co.*, 183 Mo. 1.
Miller v. *Connor*, 250 Mo. l. c. 683.

And unless so raised and passed upon by the Supreme Court of the state, this court has no jurisdiction.

Steines v. *Franklin County*, 14 Wall. 15-17, 81 U. S.
Morrison v. *Watson*, 154 U. S. 111, l. c. 115.
Spies v. *Illinois*, 123 U. S. 131, l. c. 181.
Erie Railroad Co. v. *Purdy*, 185 U. S. 248, l. c. 153.
Layton v. *Missouri*, 187 U. S. 356, l. c. 361.
Brooks v. *Missouri*, 124 U. S. 394.
Willougsby v. *Chicago*, 235 U. S. 45.
Louisville & Nashville R. R. v. *Woodford*, 234 U. S. 46.
Schuyler Nat. Bank v. *Bollong*, 150 U. S. 85.
Capital City Dairy Co. v. *Olivo*, 183 U. S. 238.
Cincinnati Pro. Co. v. *Boy*, 200 U. S. 179-182.
Chicago I. & L. R. Co. v. *McGuire*, 196 U. S. 128.
Jacks v. *Helena*, 115 U. S. 288.
France v. *Missouri*, 154 U. S. 667.
Crowell v. *Randell*, 10 Pet. 368.

The laws and decisions of other states are facts of which the courts do not take judicial notice, but the same must be proved as other facts in the case.

Sloan v. *Terry*, 78 Mo. 623.
Flato v. *Mulhull*, 72 Mo. 522.
Meyer v. *McCabe*, 73 Mo. 236.
Halton v. *Kemp*, 81 Mo. 661.
Southern Ill. Bridge Co. v. *Stone*, 174 Mo. 1.
Nenno v. *St. L. & S. F. R. R. Co.*, 105 Mo. App. 540.
McDonald v. *Bankers Life Assn.*, 154 Mo. 618.
Conrad v. *Fisher*, 37 Mo. App. 352.
Hanley v. *Donoghue*, 116 U. S. 1-6.
Chicago & Alton R. R. Co. v. *Wiggins Ferry Co.*, 119 U. S. 615-622.
Eastern Building & Loan Association v. *Ebaugh*, 185 U. S. 114.
Johnson v. *New York Life Ins. Co.*, 187 U. S. 491.

III.

The opinion of the Superior Court of New Haven, Connecticut, was not offered in evidence in the trial court. Indeed, when this cause was tried in the Circuit Court of Henry County, Missouri, the decision in the Dresser case had not been rendered; however, prior to the judgment in the Dresser case, the appellate courts of Missouri had decided that an assessment to be valid must have been made by the board of directors, and that if it appeared that the attempted assessment was excessive that no forfeiture could be declared.

King v. *Hartford Life Ins. Co.*, 133 Mo. App. 612 (decided Oct. 5, 1908).
Earney v. *Modern Woodmen*, 79 Mo. App. 385.
Hannum v. *Waddill*, 135 Mo. 153 (decided June 23, 1896).

IV.

The charter of defendant was offered and received in evidence without objection.

The courts of Missouri did not fail to give full faith and credit to that act, even if it was a public act. The Missouri courts merely construed that act to mean that under its provisions an assessment to be legal must be made by the board of directors. Hence, no question arises under the full faith and credit clause of the Federal Constitution.

> *Western Indemnity Co. v. Rupp*, 235 U. S. 261.
> *Glenn v. Garth*, 147 U. S. 360.
> *Lloyd v. Matthews*, 155 U. S. 222-227.
> *Banhulzer v. New York Life Ins. Co.*, 178 U. S. 402-406.
> *Allen v. Alleghany Co.*, 196 U. S. 458-464.
> *Louisville & Nashville R. R. v. Milton*, 218 U. S. 36-51.
> *Texas & N. O. R. R. Co. v. Miller*, 221 U. S. 408-416.

V.

The judgment in the Dresser case was not certified as required by the Acts of Congress, and would not have been admissible in the trial court, even if the same had been in existence then and had been offered, and if the same could have been injected into the appellate court by an appendix to appellant's brief, yet not having been properly certified (printed Record, page 295), it was not open to consideration. Therefore, there is no proof anywhere in this case that there is such judgment as the alleged Dresser judgment.

> *Caperton v. Ballard*, 81 U. S. 238.

VI.

Even if the instructions of the trial court, which were approved by the Kansas City Court of Appeals and the Supreme Court of Missouri were erroneous, the defendant was not thereby deprived of due process of law or the equal protection of the law. So also, if the Supreme Court of Missouri erroneously held that defendant's answer did not properly plead abandonment so as to raise that issue, still that holding, whether right or wrong, does not involve any federal question.

The appellate courts of Missouri, on questions of general law, have the same power to decide wrong that they have to decide right, and if an erroneous decision of said courts gives this court jurisdiction, then any resourceful lawyer could bring any case into this court.

Glenn v. *Garth*, 147 U. S. 360, l. c. 368.
Johnson v. *New York Life Ins. Co.*, 187 U. S. l. c. 496.
Sayward v. *Denny*, 158 U. S. 180.
Sauer v. *New York*, 206 U. S. 536, l. c. 545.
Central Land Co. v. *Laidley*, 159 U. S. 103.

VII.

The question whether an assessment must be made as ordered by the board of directors was not considered or adjudicated in the Dresser case (if that judgment is to be considered at all) hence, the decision of the Supreme Court of Missouri did not fail to give full faith and credit to that judgment on that question.

VIII.

The Supreme Court of Missouri did not pass upon or decide any federal question.

It appears from the opinion of that court (printed Record, page 323) that the court held that "the record of the Dresser case is in no manner properly raised or lodged in this case, we do not deem it to be within the scope of our review and likewise the federal question based thereon." Under the authorities hereinbefore cited, the decision of the court was clearly not based on any federal question, but was in accord with prior decisions of the appellate courts of Missouri, on the questions of general law involved, so that this court is without jurisdiction of this cause.

The Ibs case and Barber case are not controlling in this case, because in those cases the Dresser judgment was pleaded and offered in evidence upon the trial in the lower court and excluded. It was held, therefore, that full faith and credit were denied that judgment. In the case here the Missouri judgment was rendered before the Connecticut judgment, so that we suppose, if it be held that the parties in the two courts were the same, if the Missouri judgment had been offered in evidence in the Connecticut court that that court would have been compelled to give full faith and credit to the judgment in the Missouri court. Of course the Missouri trial court could not put full faith in something that did not exist.

In *Miller* v. *Connor*, 250 Mo. l. c. 683, the Supreme Court of Missouri said:

> "In order to bring an appeal within our jurisdiction on a constitutional ground, it must appear

that a constitutional construction was essential to the determination of the case."

"So it must appear that a constitutional question was raised in the trial court and ruled on to the disadvantage of the party appealing."

"So, constitutional questions cannot be injected into a case for the first time in the appellate court by argument or brief of counsel, for the purpose of giving jurisdiction."

Such is the settled rule of practice in Missouri.

In *Morrison* v. *Watson*, 154 U. S. 111, l. c. 115, this court said:

"In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a state, on the ground that it decided against a title, right, privilege or immunity it must have been specially set up or claimed at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law and practice of the state, as declared by its highest court, could not be considered by that court; or, if it was not claimed in any form before judgment in the highest court of the state, it cannot be asserted in this court."

Such is the uniform trend of the decisions of this court.

In the case at bar no constitutional question was raised in the trial court; the appeal was taken by respondent to the Kansas City Court of Appeals, which has no jurisdiction in cases involving constitutional questions. It did not get into the Supreme Court of Missouri because a constitutional question was involved; it was not necessary for that court to pass upon a consti-

tutional question, and that court did not decide any constitutional question; therefore, under the uniform line of decisions of this court, no federal or constitutional question is involved, and this court has no jurisdiction.

In *Brooks* v. *Missouri*, 124 U. S. 394, this court said:

> "To be reviewable here, the decision must be against the right, so *set up* or *claimed*. As the Supreme Court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more."

The alleged judgment in the Dresser case, not having been certified as required by the Acts of Congress, was not and is not in the case.

In the case of *Caperton* v. *Ballard*, 14 Wall. 238 (81 U. S.), this court said:

> "The defendant, on the other hand, in order to sustain his plea, offered in evidence an order from the County Court of the same county, dated February 16th, 1863, reciting that administration of the estate of William Ballard, deceased, is granted to John C. Ballard, who had made with, etc., and 'that letters in due form are granted him.'
>
> This order, so far as the record shows, was certified in no other manner than by the teste of the clerk, one Lewis Callaway. There was not even a seal attached to the certificate.
>
> It may be conceded that the decision on this subject could be reviewed, if the record showed a state of case in which this provision of the constitution was applicable, but in the absence of this we

cannot consider the point, whatever may be the hardship of this particular suit.

The same constitutional provision which ordains 'that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state,' also ordains that the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof. Congress acted on this subject * * * This act ordains further that the said records and judicial proceedings, *authenticated* as aforesaid, shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." * * *

"To receive this conclusive effect, however, it must not only be pleaded, but proved, in conformity with the Act of Congress on the subject. Unless this is done there is nothing for this court to act upon."

The case at bar comes clearly within the above cited case.

We respectfully ask that our motion be sustained.

MATTHEW A. FYKE,
Kansas City, Mo.

PEYTON A. PARKS,
Clinton, Mo.

Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 291, OCTOBER TERM, 1918.

HARTFORD LIFE INSURANCE COMPANY,
Petitioner,

vs.

NANNIE M. JOHNSON,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri.

BRIEF OF PETITIONER IN RESPONSE TO MOTION TO QUASH WRIT OF CERTIORARI OR TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF MISSOURI.

JAMES C. JONES,
GEORGE F. HAID and
JAMES C. JONES, JR.,
Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., Ninth and Walnut Sts. Bell, Main 1819.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 291, OCTOBER TERM, 1918.

HARTFORD LIFE INSURANCE COMPANY, *Petitioner,*

vs.

NANNIE M. JOHNSON, *Respondent.*

On Writ of Certiorari to the Supreme Court of Missouri.

BRIEF OF PETITIONER IN RESPONSE TO MOTION TO QUASH WRIT OF CERTIORARI OR TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF MISSOURI.

Respondent, in her motion to quash the writ of *certiorari* heretofore issued in this cause, or to affirm the judgment of the court below, advances substantially the same reasons that were urged by her in her objections to the issuance of the writ filed

herein in response to the application for the writ of *certiorari* made by the petitioner.

The contentions of the respondent in her present motion were discussed and considered in the brief filed by petitioner in answer to respondent's objections to the issuance of the writ in the first instance, and are again considered in petitioner's brief filed herein upon the merits of the cause. Under these circumstances it would be a mere reiteration of what has already been discussed in the briefs, and considered by the Court before the granting of the writ, to again enter into a discussion of the question now raised by the respondent for the second time, and we will therefore confine ourselves here to a discussion of the only new or additional contention made by the respondent in her present motion, to wit, that the decree of the Connecticut Court in the Dresser case cannot be considered, because that decree was not exemplified or authenticated as required by the act of Congress.

It is true, as respondent says, that the decree was merely certified by the Clerk of the Connecticut Court as a copy of the original decree entered by that Court, and was not authenticated, as required by the act of Congress, but no objection was made by the respondent to this decree on that ground in either the Kansas City Court of Appeals or the Supreme Court of Missouri.

The Kansas City Court of Appeals discussed and considered this decree, and held that it was not *res judicata* of any issues in this case, not because it was not properly authenticated, but because the plaintiff in this case was not a party to the Dresser suit and was, therefore, not bound by the decree rendered by the Connecticuit Court.

The Supreme Court of Missouri, likewise, held that the decree was not *res judicata* of any issues in this case, not because it was not properly authenticated, but because it was not formally offered in evidence at the trial of this cause. It is true that the decree was not offered in evidence at the trial of the cause, but, as was stated in the petition for the writ of *certiorari*, this was due to the fact that the decree in the Dresser case was not rendered by the Connecticut Court until after the hearing in the trial court, and while this cause was pending upon appeal in the Kansas City Court of Appeals. But during the pendency of the cause in the latter court the attention of the Court was called to the decree of the Connecticut Court, a certified copy of that decree was filed, and, as heretofore stated, that decree was considered in disposing of the case in the Kansas City Court of Appeals.

We submit, under these circumstances, the respondent cannot now urge for the first time that the decree of the Connecticut Court cannot be considered

and is not entitled to full faith and credit because the same was not properly authenticated.

In the case of Wood v. Weimar, 104 U. S., *l. c.* 795, objection was made in this court that the attestation of the Recorder of Deeds of the correctness of the transcript was not certified in accordance with the Act of Congress. This Court said:

> "This was not the objection made below, and it comes too late here. There the attention of the Court was called only to the competency, materiality and relevancy of the deed; here, to the form of the authentication of the copy. The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below, and passed upon directly or indirectly."
>
> Culvertson v. The H. Witbeck Co., 127 U. S., *l. c.* 333.

Furthermore, even if the Dresser decree is left out of consideration entirely, this Court still has jurisdiction of this cause upon constitutional grounds. Petitioner at the trial of this cause introduced in evidence its legislative charter, which was entitled to full faith and credit in the courts of Missouri, under the provisions of Article IV, Section 1, of the Constitution of the United States (Hartford Life Insurance Company v. Barber, 245 U. S., *l. c.* 150).

In its opinion in this case the Supreme Court of Missouri stated that "it appears that the charter and

by-laws of the appellant company provide that all the affairs of the company should be managed and controlled by a board of directors", but it held that the assessment in question was invalid on the ground that it was made and levied by the officers of the petitioner, instead of being formally made and actually levied by the board of directors of the petitioner.

The charter of the petitioner was granted by the General Assembly of the State of Connecticut in the year 1866, and contains the following provision:

> "All the affairs of said corporation shall be managed and controlled by a board of not less than seven directors (the number of said directors to be determined by the by-laws of said company)."

As was held by this Court in the case of Hartford Life Insurance Company v. Barber, 245 U. S., *l. c.* 150, the assessment clearly was made under the directors' management and control. This question is fully discussed in the brief of the petitioner upon the merits at pages 15, *et seq.*, and it would unnecessarily burden the records of this Court to repeat that argument here.

We respectfully submit that, the Court having considered the question of the issuance of the writ

upon briefs filed by both parties, further consideration of the question should be postponed until the argument of the cause upon the merits.

JAMES C. JONES,
GEO. F. HAID,
JAMES C. JONES, JR.,
Attorneys for Petitioner.

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IN THE

PREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

TFORD LIFE INSURANCE
OMPANY,
Petitioner,

vs.

NIE M. JOHNSON,
Respondent.

No. [redacted] 291

WRIT OF CERTIORARI TO THE SUPREME
COURT OF MISSOURI.

BRIEF OF PETITIONER, HARTFORD LIFE INSURANCE COMPANY.

JAMES C. JONES,
GEO. F. HAID,
JAMES C. JONES, JR.,
Attorneys for Petitioner.

Louis Law Printing Co., Ninth and Walnut Sts. Bell, Main 1819.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

HARTFORD LIFE INSURANCE COMPANY, *Petitioner,* vs. NANNIE M. JOHNSON, *Respondent.*	No. 742.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

BRIEF OF PETITIONER, HARTFORD LIFE INSURANCE COMPANY.

STATEMENT.

This case is substantially a replica of Hartford Life Insurance Company v. Barber, 245 U. S. 146, and Hartford Life Insurance Company v. Ibs, 237 U. S. 662.

It is a suit against the same Company upon the same form of policy on the assessment plan of insurance. There is the same defense, forfeiture of the policy for non-payment of an assessment due under it

on the 1st day of June, 1902, designated as Call 95, and the same confession of the fact of non-payment of the assessment and attempted avoidance of the consequence by the allegation that the assessment was illegal and void because for an excessive amount. There is this difference in these cases, however. In the Barber and Ibs cases the decree of the Connecticut Court in the case of Dresser *et al.* v. Hartford Life Insurance Company *et al.*, was offered in evidence in the trial court, whereas in this case the decree of the Connecticut Court was not offered in evidence at the trial, for the reason that that decree had not then been entered. After the trial of this case, and while the same was pending on appeal in the Kansas City Court of Appeals, the Connecticut decree was entered and thereupon the defendant promptly filed a certified copy of that decree in the Kansas City Court of Appeals (Rec., p. 283) and asserted in that court that that decree was determinative of the issues of this case. The Kansas City Court of Appeals, in its opinion rendered in this cause, considered and discussed the effect of the Dresser decree on the issues of this case (Rec., pp. 297, 302), but held contrary to the ruling of this Court in the Ibs and Barber cases, that the Dresser decree was of no moment, because the two cases "are not identical in parties, cause of action or decisive issues" (Rec., p. 304).

Because of the dissent of one of the Judges from the majority opinion of the Kansas City Court of Appeals, this case was then transferred, in accordance with the practice in Missouri, to the Supreme Court of that State (Rec., p. 2). The Missouri Supreme Court, in its opinion (Rec., p. 316) held that it could not consider the decree of the Connecticut Court, be-

cause it was not rendered until after the trial, and was not pleaded or offered in evidence at the trial.

There is also this difference between this and the Barber and Ibs cases: In this case the assessment in question was made and levied five years prior to the death of the insured, and during that period the insured never paid or offered to pay the Company the amount of the dues or assessments or anything by way of subsequent dues or assessments.

The trial court in Missouri instructed the jury that if it found that there was in excess of one million dollars ($1,000,000.00) in the Safety Fund and a surplus in the Mortuary Fund at the time the asssessment in question was levied the defendant could not declare a forfeiture of the policy for the non-payment of the assessment (Rec., p. 221). This instruction in authorizing the jury to find that there was in excess of one million dollars ($1,000,000.00) in the Safety Fund at the time this assessment was levied is not only unsupported and unjustified by the evidence, but it is in the very teeth of the undisputed and uncontradicted evidence that there was not in excess of one million dollars ($1,000,000.00) in the Safety Fund at that time or at any other time (Rec., p. 214-218). This instruction is further erroneous and directly contrary to the provisions of the policy in suit and to the ruling of this Court in the Ibs and Barber cases, in that it permits the jury to find that the assessment in question was illegal if there was a surplus in the Mortuary Fund.

The trial court in Missouri also instructed the jury that the defendant could not declare a forfeiture of the policy for the non-payment of the assessment in

question unless they found that the assessment "was made and levied by the board of directors" of the Company (Rec., pp. 221-222).

ASSIGNMENT OF ERRORS.

Petitioner relies upon the following errors assigned by it in its petition for writ of *certiorari*:

I.

"The Supreme Court of Missouri, contrary to and in violation of Article IV, Section 1, of the Constitution of the United States, failed and refused to give full faith and credit to the judgment and decree of the Superior Court of New Haven County, Connecticut, in the case of Charles H. Dresser *et al.* v. Hartford Life Insurance Company *et al.*, in this: that the Supreme Court of Missouri holds that the Mortuary Fund of the Men's Division of the Safety Fund Department could not be replenished by assessments based upon death losses not previously assessed for at the time the assessments are levied, which, in effect, amounts to a holding that it was unlawful and illegal for petitioner to maintain a Mortuary Fund for the payment of death losses, whereas, not only the certificate in suit provides that assessments shall be levied against the members of this department to form a Mortuary Fund and from time to time to replenish said Mortuary Fund, from which fund all death losses are payable under the provisions of the certificate of membership in suit, but the Court of Connecticut, by its judgment and decree in the case of Charles H. Dresser *et al.* v. Hartford Life Insurance Company *et al.*, held and adjudged that it was reasonable and proper for petitioner to maintain such Mortuary Fund for the payment of death losses and to

replenish said fund from time to time by assessments based upon death losses not previously assessed for at the time of such assessment, and also that it was proper and lawful for petitioner to maintain and keep in said Mortuary Fund for the payment of the death losses in said department an amount not exceeding the average quarterly assessment for the preceding year. The average quarterly assessment for the year preceding the assessment in question amounted to a sum in excess of three hundred thousand dollars ($300,000.00), whereas, at the time of the assessment in question, there was only forty-seven thousand four hundred sixty-two dollars and seventeen cents ($47,462.17) in said Mortuary Fund.

II.

"The Supreme Court of the State of Missouri, contrary to and in violation of Article IV, Section 1, of the Constitution of the United States, failed and refused to give full faith and credit to the judgment and decree of the Superior Court of New Haven County, Connecticut, in the case of Charles H. Dresser *et al.* v. Hartford Life Insurance Company *et al.*, in this: That notwithstanding the fact that the Superior Court of New Haven County, Connecticut, found and decreed that "the Hartford Life Insurance Company did not levy assessments unnecessary in amount or number", which finding and decree was made prior to the decision of the Supreme Court of the State of Missouri in this cause, said last-named Court holds that said assessment was illegal and void and that the failure of the insured to pay the same did not preclude recovery upon the policy or certificate of insurance sued upon.

III.

"The Supreme Court of Missouri, in its holding that there was evidence in the record herein that at the time of the levy of the assessment in question there was in excess of one million dollars ($1,000,000) in the Safety Fund of the Men's Division of the Safety Fund Department, and that, therefore, an instruction given by the trial court authorizing the jury to find that the asessment in question was illegal and void if they found that the amount in the Safety Fund of the Men's Division of the Safety Fund Department was in excess of one million dollars ($1,000,000), was proper, denies to the petitioner due process of law and deprives it of its property without due process of law, contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States, for the reason that there is no evidence in the record that the Safety Fund of the Men's Division of the Safety Fund Department was in excess of one million dollars ($1,000,000) at the time the assessment in question was levied, or at any time, but, on the contrary, the undisputed and uncontradicted evidence shows that said Safety Fund was not in excess of one million dollars ($1,000,000) at the time said assessment was levied.

IV.

"The Supreme Court of Missouri held that the charter of the petitioner required that the Board of Directors of the petitioner should make and levy the assessments under the certificate of membership issued herein, and that the assessment in controversy

was null and void because it was not made and levied by the Board of Directors of petitioner, but by its officers, and thus said Supreme Court of Missouri failed and refused to give full faith and credit to a public act and record of the State of Connecticut, to wit, the legislative charter granted to petitioner by the Legislature of the State of Connecticut, contrary to and in violation of Article IV, Section 1, of the Constitution of the United States, for the reasons:

First. That the legislative charter granted to petitioner by the Legislature of the State of Connecticut contains no requirement that assessments under the certificates of membership issued by petitioner should be made and levied by its Board of Directors; and,

Second. That, even if the charter of petitioner required that assessments under its certificate of membership should be made and levied by the Board of Directors, such power could be delegated by the Board of Directors to the officers of petitioner, and that such power was delegated by the Board of Directors of petitioner is established by the undisputed and uncontradicted evidence in the record.

V.

"The Supreme Court of Missouri, in its holding that petitioner did not plead an abandonment by the insured of the certificate of membership in suit, deprives petitioner of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, for the reason that petitioner did plead an abandonment by the insured of the certificate in suit in its answer to plaintiff's petition in the trial court and

the Supreme Court of Missouri, in its failure and refusal to give effect to, or consideration of, such defense made by petitioner in its answer deprives petitioner of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

VI.

"The Supreme Court of Missouri, in its failure and refusal to consider and pass upon the defense made by petitioner in its answer filed in the trial court, that the insured, under the certificate of membership in suit, acquiesced in the forfeiture of said certificate for failure to pay the assessment in controversy, denies to petitioner due process of law and deprives it of its property without due process of law."
sonal judgment against the petition under the certificate sued on.

VIII.

"The Supreme Court of Missouri, contrary to and in violation of Article IV, Section 1, of the Constitution of the United States, failed and refused to give full faith and credit to the judgment and decree of the Superior Court of New Haven County, Connecticut, in the case of Charles H. Dresser *et al.* v. Hartford Life Insurance Company *et al.*, in this: that the Supreme Court of Missouri holds that at the time the assessment in question was levied there was an excess of one million dollars ($1,000,000.00) in the Safety Fund of the Men's Division of the Safety Fund Department, whereas in said case of Charles H. Dresser *et al.* v. Hartford Life Insurance Company *et al.*, the Connecti-

cut Court expressly found, adjudged and decreed that at the time of the levy of the assessment in question there was not in excess of one million dollars ($1,000,-000.00) in the Safety Fund of the Men's Division of the Safety Fund Department of petitioner.

IX.

"The holding and judgment of the Supreme Court of Missouri that the assessment in question was illegal because at the time of the levy thereof there was in excess of one million ($1,000,000.00) dollars in the Safety Fund of the Men's Division of the Safety Fund Department, deprives petitioner of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Federal Constitution, for the following reasons:

First. Because neither the amount nor the validity of the assessment, under the terms of the certificate of membership or policy sued on, is dependent in any way upon the amount in the Safety Fund of the Men's Division of the Safety Fund Department; and

Second. Because the Safety Fund of the Men's Division of the Safety Fund Department is not under the control or in the possession of petitioner, but is under the sole and exclusive control and supervision of the Security Company of Hartford, Connecticut, and is being held and administered by that company as Trustee under the terms of a trust agreement, a copy of which it attached to and made a part of the certificate or policy sued on, and under the supervision of the courts of the State of Connecticut, and if, as the Supreme Court of Missouri holds, there was evidence tending to show that said Safety Fund was in

excess of one million dollars ($1,000,000.00) at the time of the levy of the assessment in question, it was because of no fault on the part of petitioner and does not justify the holding of the Supreme Court of Missouri that the assessment was illegal for that reason.

X.

The holding and judgment of the Supreme Court of Missouri in affirming an instruction of the trial court which told the jury, among other things, that the assessment was illegal if they found from the evidence that at the time of the levy of the assessment in question there was a 'surplus' in the Mortuary Fund of the Men's Division of the Safety Fund Department, deprives petitioner of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, for the reason that there is no evidence that there was any surplus in said Mortuary Fund at the time of the levy of the assessment in question and the jury was not told or instructed by the trial court what would constitute a 'surplus' in said Mortuary Fund."

POINTS AND AUTHORITIES.

I.

The Supreme Court of Missouri denied full faith and credit to the legislative charter of petitioner in holding the assessment to be illegal because made by the officers of the Company and not by the directors.

> Hartford Life Ins. Co. v. Barber, 245 U. S. 146;
> Great Western Co. v. Purdy, 162 U. S. 330, 334;
> Terry v. Merchants, Etc., Bank, 66 Ga. 177, 178;
> Lassley v. Fountain, 4 Henning & Mumford, 146;
> Cooley's Briefs on Insurance, Vol. II, p. 1027;
> Fee v. National Association, 110 Iowa, 271.

II.

The Supreme Court of Missouri denied full faith and credit to the decree of the Connecticut Court in the Dresser case by its holding that the assessment in question was illegal and excessive because it was levied to replenish the Mortuary Fund.

> Hartford Life Ins. Co. v. Ibs, 237 U. S. 662;
> Hartford Life Ins. Co. v. Barber, 245 U. S. 146;
> Creswill v. Knights of Pythias, 225 U. S. 246;
> Northern Pac. v. North Dakota, 236 U. S. 585.

III.

Where the Supreme Court of the United States obtains jurisdiction on a federal ground, it does not

lose jurisdiction because of the existence of a non-federal ground, if the non-federal ground is palpably unsound and directly contrary to the undisputed evidence.

> Leathe v. Thomas, 207 U. S. 93, 99;
> Johnson v. Risk, 137 U. S. 300, 301;
> German Savings Society v. Dormitzer, 192 U. S. 125;
> Klinger v. Missouri, 13 Wall. 257.

IV.

A judgment of a State court against a defendant based on a finding and holding which is unsupported by the evidence and directly contrary to the undisputed and uncontradicted evidence deprives defendant of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

> Chicago, Burlington, Etc., Ry. Co. v. Chicago, 166 U. S. 226, 234.

V.

The holding of the Supreme Court of Missouri that petitioner did not plead an abandonment of the policy in suit by the insured overlooks or disregards the allegations of the answer (Rec., p. 7); and the Missouri Supreme Court, by its holding that petitioner was not entitled to the defense of abandonment because an abandonment was not pleaded, when in fact it was pleaded and the cause was tried on the theory that it was properly pleaded, deprives petitioner of its

property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

Hovey v. Elliot, 167 U. S. 409;
Windsor v. McVeigh, 93 U. S. 274;
Chicago, Etc., Ry. Co. v. Chicago, 166 U. S. 226.

ARGUMENT.

The Supreme Court of Missouri Failed to Give Full Faith and Credit to the Legislative Charter of Petitioner.

The Supreme Court of Missouri, in its opinion (following its earlier opinion in the case of Barber v. Hartford Life Insurance Company, 269 Mo. 21, 187 S. W. 867, which was subsequently reversed by this Court in 245 U. S. 146) holds that the assessment in question was illegal and void because it was not actually made and levied by the board of directors of the Company as such, but by the officers of the petitioner.

The legislative charter of petitioner, which is in evidence in this cause (Rec., p. 95) was granted by the General Assembly of the State of Connecticut in the year 1866, and contains the following provision:

> "All the affairs of said corporation shall be *managed and controlled* by a board of not less than seven directors (the number of said directors to be determined by the by-laws of said Company)."

It is further established by the undisputed and uncontradicted evidence in this case, a fact ignored by the Missouri Supreme Court, that not only the assessment in question, but all previous assessments, were made and levied by the officers of the petitioner (Rec., p. 199), and the contention that this amounted

to a delegation by the directors of petitioner of the power to make and levy these assessments, and the Missouri Court in effect, treats this power as one which was non-delegable by the board of directors.

The charter in question, being a legislative charter, granted by the Legislature of the State of Connecticut, is a public act or record of that State (Terry v. Merchants & Planters Bank, 66 Ga. 177, 178; Lassley v. Fountain, 4 Hening & Mumford 146), and entitled to full faith and credit under Article IV, Section 1, of the Fourteenth Amendment to the Constitution of the United States.

The charter of petitioner does not require that these assessments shall be *levied by* the board of directors of petitioner, and in the absence of such a provision the power to make and levy the same may be delegated by the board of directors to the officers. The rule is stated in Cooley's Briefs on Insurance (Vol. II, p. 1027) as follows:

> "*Delegation of Power*—If the by-laws of a mutual benefit insurance society provide that assessments for death losses *shall be levied by the Board of Directors*, the Board can not delegate such power to the president. But where the articles of a company provided that the directors should control its affairs, and empowered them to enact by-laws and rules and to appoint from their number an executive committee who should supervise the business of the company and audit accounts and provide for assessments, but was *silent* as to *who* should *make them*, the *directors had authority* through a by-law *to empower the executive committee to make assessments.*"

See also to the same effect:

Fee v. National Masonic Association, 110 Iowa 271, 81 N. W. 483;

Conductors' Association v. Birnbaum, 116 Pa. St. 565.

The fact that all previous assessments were made and levied by the officers of the petitioner, with the knowledge of and without objection from the board of directors, shows and establishes that the power to make and levy this particular assessment was delegated by the directors to the officers of petitioner.

Martin v. West, 110 U. S. 7;

McCormick v. Unity Co., 140 Ill. Ap. 159 (aff. 209 Ill. 306).

This Court, in Hartford Life Insurance Company v. Barber, 245 U. S. 146, in reversing the ruling of the Supreme Court of Missouri that the assessment there in question was illegal and void because it was not actually made and levied by the board of directors of petitioner, and in holding that the ruling of the Missouri Court in this regard failed to give full faith and credit to the legislative charter of petitioner, says:

"A jury would have been justified, at least, in finding that the call was made by the directors within the meaning of the instructions, although it did not appear that the directors went over the figures of the officers who made it up, and voted it specifically. *It clearly was made under the directors' management and control.* The verdicts for the plaintiff hardly could have been rendered except upon the other ground opened up by the

instructions, that the assessment was for a larger amount than was necessary to pay death losses up to that time. Upon that ground the verdicts were a matter of course, and *we regard the reference to the directors' part in the assessment as a make weight which adds nothing to the substantial basis for the decision below.* See Terre Haute & Indianapolis R. R. Co. v. Indiana, 194 U. S. 579, 589. *The powers given by the Connecticut charter are entitled to the same credit elsewhere* as the judgment of the Connecticut Court. Supreme Council of the Royal Arcanum v. Green, 237 U. S. 531, 542."

The charter requirement that the directors shall "manage and control all the affairs" of the Company does not mean that the directors shall as such themselves *do* all the affairs. To state this proposition is to refute it, for this would require the board of directors to be constantly in session and as such to attend to every detail of the Company's business, which would not be "managing and controlling" its affairs.

Directing one to "manage and control" naturally, and almost necessarily, presupposes that another shall *do* what one is directed to *manage and control.*

The Missouri Supreme Court construes the requirement to "manage and control" all the affairs as a mandate that the directors shall "*actually* levy all assessments and *make a record* thereof". The making and levy of the assessment in question was in the nature of a ministerial, and not a discretionary act. The assessments are fixed and determined by the table of rates in the certificate and the amount of unassessed-for death losses at the time the assessment

was levied. The only discretion in making and levying these assessments is in the determination of the amount which the Company shall allow for the failure of certain members to pay such assessment, and this involves very little, if any, discretion, as the amount of such allowances was based on the number of members who had failed to pay the preceding assessment. If the allowance actually made for the discontinuance of membership was greater than that actually experienced, the difference remained in the Mortuary Fund, and was applied to the payment of death losses, thereby resulting in a decrease of the subsequent assessments to be levied against the members (Rec., pp. 201, 206).

We submit that the holding of the Supreme Court of Missouri that the assessment in question was illegal and void because it was not actually made and levied by the board of directors as such, fails to give full faith and credit to the legislative charter of petitioner, as required by the Fourteenth Amendment to the Constitution of the United States.

II.

The Supreme Court of Missouri Failed to Give Full Faith and Credit to the Dresser Decree.

The policy involved here is on the assessment plan. Assessments were made quarterly. The proceeds of the assessments were paid into the Mortuary Fund, and out of this fund all death losses were paid. The Company maintained this fund so that losses could be paid promptly and in advance of assessment therefor, and in order to maintain this fund it was necessary to

make assessments on account of the losses thus paid in advance.

In Dresser *et al.* v. Hartford Life Insurance Company, brought in Connecticut, certain certificate holders attacked this Mortuary Fund as illegal, and asserted that death losses could only be paid after an assessment therefor, and prayed for a distribution of the money in this fund *pro rata* among themselves. On the 23d day of March, 1910, the Connecticut Court entered its decree in the Dresser case, in which, among other things, it was adjudged, with respect to the Mortuary Fund (Rec., p. 291):

> "That it is proper and reasonable that the Company should hold some such fund for the purpose of enabling it to pay death losses promptly, but it is not necessary for that purpose that the Company should hold more than the amount of one average quarterly assessment for the previous year."

It was also further adjudged by the Dresser decree that (Rec., p. 292):

> "If in the future any excess in said fund above the average of the four preceding quarterly assessments in said Men's Division of the Safety Fund Department of said Company shall be distributed to the certificate-holders in diminution of assessments by crediting and applying such excess on account of the next succeeding assessment."

The undisputed and uncontradicted evidence in this case shows that the average of one quarterly assess-

ment for the year preceding the assessment in question was $350,687.65 (Rec., p. 142), whereas the amount in the Mortuary Fund at the time this assessment was levied May 1, 1902, amounted to $47,462.17 (Rec., p. 143), so that the amount in the Mortuary Fund at the time this assessment was levied was considerably less than the amount which the Company was authorized to maintain in that fund under the terms of the Dresser decree. The Missouri Supreme Court held in this case, however, that not only was the amount then in the Mortuary Fund illegal, but also that it was unlawful for the Company to maintain *any* Mortuary Fund at all. In that connection the Missouri Supreme Court says (Rec., pp. 322-323):

> "It is contended by appellant that, under the policy contract, it had the right to make assessments for death losses occurring in the future to provide a mortuary fund from which future death losses could be promptly paid. We are unable to agree with this contention. This identical point was recently before the Supreme Court of Minnesota in the case of Ibs v. Hartford Life Insurance Co., 121 Minn. 310, 141 N. W. 289, Ann. Cas. 1914C, 798. The policy contract there in judgment was issued by the appellant herein, and the terms of the policy were in legal effect substantially the same as the terms of the policy contract now considered. It was there held that the policy contract did not authorize the company 'to accumulate a mortuary fund out of which to pay death losses that occur in the future.' The Court said:

"'It is settled law that an assessment to pay future losses is illegal, unless the power is conferred by the contract; and we hold that the contract between the insured and defendant can not be fairly construed as conferring that power. As it is clear that the assessment in question here was not necessary to pay accrued losses, but was in reality levied to pay losses that might be anticipated to occur in the future, it follows that it was unauthorized, and could not be made the basis of a forfeiture.' 121 Minn. *loc. cit.* 315, 141 N. W. 291, Ann. Cas. 1914C, 798.

"Among the authorities cited by the Supreme Court of Minnesota in support of that proposition is the case of Johnson v. Hartford Life Ins. Co., 166 Mo. App. 261, 148 S. W. 631 (the same being the opinion of the Kansas City Court of Appeals in the case at bar). We are aware that the judgment of the Minnesota Supreme Court in the case of Ibs v. Hartford Life Insurance Company, *supra*, was later by the Supreme Court of the United States reversed. Hartford Life Insurance Co. v. Ibs, 237 U. S. 662, 35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765. But the reversal was on a ground not involved in the case at bar, viz. on the ground that full faith and credit clause of the Constitution of the United States (Article IV, Section 1) had been violated by the Minnesota court in rejecting proof of the record of a Connecticut court in a case known as the Dresser Case.

"The case at bar was tried below on May 12, 1909, which was prior in time to the entering of the decree in the Dresser Case, and the record in

the Dresser Case was therefore not offered or presented in the trial of this case. *Since the record of the Dresser Case is in no manner properly raised or lodged in this case, we do not deem it to be within the scope of our review, and likewise the Federal question based thereon. Under such circumstances the rule announced by the Supreme Court of the United States in Ibs v. Hartford Life Insurance Co., supra, should not be applied to this case."*

It is true, as the Missouri Supreme Court states in its opinion, that petitioner did not (as it could not) offer the Dresser decree in evidence at the trial of this case, because that decree was not rendered until after the trial of this case, but the Supreme Court of Missouri ignores the fact that as soon as that decree was rendered, and while this cause was pending in the Kansas City Court of Appeals, petitioner filed said decree with its brief in that Court and asserted in that Court that said decree was *res judicata* of the issues in this case and the Kansas City Court of Appeals, in its opinion, considered and passed upon the effect of this decree, but held, contrary to the ruling of this Court in the Ibs and Barber cases, that the same was not *res judicata* in this case on the ground that the issues and the parties in the two cases were not the same (Rec., p. 304).

We submit that if the respondent here, the Company, was bound by the Dresser decree, and the same was determinative of the issues of this case, and it is so held by this Court in the Ibs and Barber cases, then that decree was entitled to full faith and credit, even though it

was rendered after the trial, and brought forward for the first time while this cause was pending in the Kansas City Court of Appeals. In the case of Jenkins v. International Bank, 127 U. S. 484, 488, after the trial was had, but while the trial court still retained jurisdiction of the cause, a judgment was rendered in another jurisdiction which was determinative of the issues of the cause. Upon the rendition of the judgment in the second suit the complainant filed a supplemental bill in the trial court setting forth the judgment in the latter action, and it was held by this Court that such judgment was entitled to full faith and credit, even though it was rendered subsequent to the trial of the first action. The Court, in that case, said:

> "It is contended by the plaintiff in error that the Supreme Court of Illinois erred in giving effect in this suit to the decree of February 28, 1878, in the Wilshire suit as set up by the International Bank in its supplemental bill filed herein November 26, 1883, more than two years after July 31, 1878, when the assignee in bankruptcy succeeded to the title of the bankrupt Walker * * *
>
> "In support of this proposition, it is argued on behalf of the plaintiff in error that the supplemental bill set out, and sought a recovery upon, a cause of action distinct from that stated in the original bill. The original bill prayed for a decree against Walker upon his notes held by the bank, and for the satisfaction thereof a sale of the property held as security therefor. During the pendency of that bill precisely the *same mat-*

ters were put in issue in the Wilshire suit between Walker and the bank, and in that suit a decree was rendered finding the amount due. *That decree* in the Wilshire suit stands unreversed, and operates as an *estoppel* by way of *res adjudicata* between the parties. By way of proof or in pleading it would be good as a bar in any subsequent suit between the same parties upon the same issues. Having been rendered *after the institution of the present suit*, it was *competent for the complainant to bring it forward by a supplemental bill* as conclusive evidence of the amount due for which it was entitled to take a decree * * * It was strictly new matter arising after the filing of the bill, properly set up by way of supplemental bill, in support of the relief originally prayed for."

The only difference between the Jenkins case and the case at bar is that in the Jenkins case the judgment in the second action was brought forward while the trial court still retained jurisdiction of the original action, whereas in the case at bar the Dresser decree was brought forward for the first time in the Kansas City Court of Appeals because the trial court had, by the appeal to that Court, lost all jurisdiction of the action. This decree being entitled, under the mandate of the Constitution of the United States, to full faith and credit, it would seem, on principle, that it should be accorded the same full faith and credit in the Kansas City Court of Appeals and in the Supreme Court of Missouri, even though the cause was then pending on appeal, as it would have been entitled in the trial court had the same been rendered

and introduced in evidence at the time the trial was had.

Suppose that a beneficiary under a policy, living in Illinois, should bring an action on the policy in that State and judgment should be entered by the trial court in favor of the defendant, from which judgment the beneficiary should perfect an appeal to the Supreme Court of Illinois, and that pending such appeal the beneficiary should institute another action on the policy in the State of Missouri, and should recover judgment in the Missouri court, and that pending the appeal by the defendant from the judgment of the Missouri court in favor of the plaintiff, the Illinois Supreme Court should affirm the judgment of the trial court of that State in favor of the defendant, could it be contended, under such circumstances, that the Illinois judgment would not be entitled to full faith and credit in the Missouri court because it was not rendered until after the trial of the Missouri case was had and that the Missouri Appellate Court could disregard the Illinois judgment and affirm the judgment of the Missouri trial court in favor of the beneficiary? We think not. And that is precisely the case we have here.

III.

Non-Federal Grounds Insufficient to Support Judgment.

The claimed non-federal grounds on which the opinion of the Supreme Court of Missouri is in part based, to wit, that the assessment in question was void both because there was an excessive amount in the Safety Fund at the time the assessment was

levied, and because the assessment was levied to pay future death losses, are insufficient to sustain this judgment. The finding on conclusions of the Missouri Supreme Court as to these questions is not only entirely without support by the record evidence, but is contrary to both the record evidence and the policy or certificate in suit. It is well settled that where this Court obtains jurisdiction on a federal ground it is not deprived, nor will it dispossess itself, of jurisdiction when the non-federal grounds on which the judgment of the State court sought to be sustained are palpably unfounded or without support in the record evidence. In other words, the State court can not deprive this Court of jurisdiction by an attempt to sustain its judgment on non-federal grounds which are manifestly erroneous and unsupported by the evidence. In this case, and leaving out of consideration the lesser decree, this Court still has jurisdiction of this cause, because the Supreme Court of Missouri, in its holding that the assessment was void because it was not made and levied by the board of directors, as such, refused to give full faith and credit to the charter of petitioner, in violation of Article IV, Section 1, of the Federal Constitution.

In the case of Leathe v. Thomas, 207 U. S. 93, 99, the Court, in holding that it would retain jurisdiction where the non-federal ground on which the judgment of the State court was sought to be sustained was "palpably unfounded", said:

> "If the ground of decision did not appear and *that which did not involve a federal question was so palpably unfounded* that it could not be pre-

sumed to have been entertained, it may be that this Court would take jurisdiction."

And in Johnson v. Risk, 137 U. S. 300, 301, the Court, in holding that a non-federal ground must of itself be sufficient to sustain the judgment of the State court, says:

> "Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the *independent ground* was not a good and valid one, *sufficient of itself to sustain the judgment, this Court will take jurisdiction* of the case, because when put to inference as to what points the state court decided, we ought not to assume that it proceeded on grounds clearly untenable."

See also to the same effect:

> German Savings Society v. Dormitzer, 192 U. S. 125;
> Klinger v. Missouri, 13 Wall. 257.

The holding of the Missouri Supreme Court that the assessment in question was void on the ground that it was levied to pay future death losses, evinces an entire disregard of the provisions of the policy or certificate, and is in the very teeth of those provisions. The assessment in question was not levied to pay future death losses. On the contrary, it was levied to replenish the Mortuary Fund, from which all death

losses are payable. The policy or certificate in suit expressly provides (Rec., p. 100) that it is issued

> "in consideration of the representations * * * *and of the further payment* of all mortality calls proportioned to the said indemnity * * * *to form a Mortuary Fund* for the *payment* of *all Indemnity matured by deaths of members.*"

The certificate also further provides that upon the maturity of the policy (Rec., p. 100)

> "There shall be due and *payable, out of the aforesaid Mortuary Fund, and not otherwise*, the indemnity of five thousand dollars."

The undisputed and uncontradicted evidence shows that the assessment in question, as well as all previous assessments, were based on death losses which had already accrued at the time the assessment was levied, the proceeds of which were paid into the Mortuary Fund from which all death losses were paid (Rec., p. 207). The assessment, therefore, was *not* levied to pay future death losses, as held by the Missouri Court, but was levied *to replenish the Mortuary Fund* from which all deaths were paid and payable. In the Ibs case the Minnesota Supreme Court held, as does the Supreme Court of Missouri, following the ruling of the Minnesota Court in this case, that the assessment in that case was void on the ground that it was levied to pay future death losses. This Court, in reversing the judgment of the Minnesota Court, and in construing the certificate or policy, said:

> "The Mutual Insurance plan contemplated the creation of a Safety Fund of $1,000,000 from

membership fees. In addition to this *there was to be a Mortuary Fund, raised by graduated assessments levied on all the members for use in the payment of death claims.*"

And in the Barber case this Court says concerning the assessments under these certificates:

> "The assessment was for the purpose of keeping up a fund of \$300,000 to meet deaths promptly as they occurred."

Therefore, the holding of the Supreme Court of Missouri that the assessment in question was levied to pay future death losses, being directly contrary to the provisions of the certificate in suit and the record evidence, is insufficient to support this judgment as a non-federal ground of decision.

The further finding and holding of the Missouri Supreme Court that at the time of the levy of the assessment in question there was in excess of \$1,000,000 in the Safety Fund is not only unsupported by the evidence, but is directly contrary to the undisputed and uncontradicted evidence that at the time this assessment was levied that fund was not in excess of \$1,000,000 (Rec., pp. 214-215).

Under the terms of the certificate in suit it is provided that when the amount of the Safety Fund of the Men's Division of the Safety Fund Department of your petitioner reaches the sum of three hundred thousand dollars (\$300,000.00) the income therefrom, and when the sum reaches the sum of one million dollars (\$1,000,000.00) both the income and all further contributions thereto shall be turned over to your petitioner by the Security Company to be applied in

reduction of the assessments of the certificate holders in this department. The Supreme Court of Missouri, in its opinion in this case, holds that the record evidence was sufficient to justify a finding of the jury that at the time of the lapse of the assessment in question there was one million one hundred seventy-six thousand five hundred sixty-one dollars and twenty-five cents ($1,176,561.25) in that fund. The holding of that Court to this effect is absolutely and entirely without foundation or support in the evidence, and, on the contrary, is directly opposed to the undisputed and uncontradicted evidence, which shows that the amount in the Safety Fund of the Men's Division of the Safety Fund Department was not in excess of one million dollars ($1,000,000.00) at the time this assessment was levied (Rec., pp. 164, 214). The only evidence which the Missouri Supreme Court cites in support of this holding is an item contained in the annual report filed by your petitioner with the Insurance Department of Missouri for the year ending December 31, 1902, which gives the *book value* of the Safety *Funds* as follows:

> "Net Safety Funds. . .$1,176,561.25" (Rec., p. 42).

The uncontradicted and undisputed testimony of both the officials of your petitioner and of the Security Company, the trustee of the Safety Fund, as well as the books and records pertaining to said fund, established absolutely and unequivocally that the amount, one million, one hundred seventy-six thousand, five hundred sixty-one dollars and twenty-five cents ($1,176,561.25) as the "Net Safety Funds"

stated in the foregoing report was the aggregate amount of *two* (2) Safety Funds, the Safety Fund of the *Men's* Division and the Safety Fund of the *Women's* Division of the Safety Fund Department of the petitioner. Defendant's Exhibit 20 (Rec., p. 215), prepared by the Security Company, trustee of the Safety Fund, shows that on December 31, 1902, there was in its possession to the credit of the Men's Division of the Safety Fund, securities of the par value of $1,000,000 and that said trustee held to the credit of the Women's Division of the Safety Fund securities of the par value of $120,401.64.

Said exhibit further shows that on December 31, 1902, the book value of the securities in the respective funds, together with the income (which had not yet been turned over to the Insurance Company), appeared on the books of said trustee as follows:

Men's Safety Fund	$1,056,940.29
Women's Safety Fund	126,562.86
Men's Income Account	25,096.92
Women's Income Account	2,292.66
	$1,210,892.73
From which is to be deducted the "Depreciation in Safety Fund" (page 40 of Record) required under the departmental regulation, of	34,330.98
Leaving the sum of..........	$1,176,561.75

but which erroneously appears in the report (Rec., p. 42) as $1,176,561.25.

The unequivocal and undisputed evidence also shows that the Men's Division of the Safety Fund Department and the Women's Division of the Safety Fund Department were separate and independent divisions established at different times, the certificates issued in the two departments containing different provisions, the funds in each department were kept separately, the assessments payable by the members under the certificates in the two departments being different, the provisions of the trust agreements pertaining to the Safety Funds in the two departments and the manner and method of their administration and distribution by the Security Company as Trustee being different, and the two divisions operated and maintained as separate and distinct entities (Rec., pp. 153, 164, 167-168).

Furthermore, the aforementioned report filed by your petitioner with the Missouri Insurance Department does not designate the amount above referred to, one million, one hundred seventy-six thousand, five hundred sixty-one dollars and twenty-five cents ($1,176,561.25) as the amount in the Safety Fund of the Men's Division of the Safety Fund Department, but as "Net Safety *Funds*," which shows conclusively that there was more than one Safety Fund therein referred to. The holding of the Supreme Court of Missouri, therefore, that the jury was authorized to find from this report that there was in excess of one million dollars ($1,000,000.00) in the Safety Fund of the Men's Division of the Safety Fund Department at the time this assessment was levied when the uncontradicted and undisputed evidence shows that the amount of the Men's Safety Fund was only one million dollars ($1,000,000.00) and that the amount stated in

this report was the aggregate amount of both the *Men's* Safety Fund and the *Women's* Safety Fund is in effect ruling that the jury may find that *two* is *not two* but *one*. The jury may find either way when there is some evidence to support their finding, but to support a jury's finding and base a judgment thereon when the finding is one way and all the evidence is the other way is not only insufficient to sustain the judgment of the Missouri Supreme Court on a non-federal ground, but also deprives the defendant of its property without due process of law. A party against whom a judgment has been rendered which is without support or foundation in the evidence may have had *some* process of law under such circumstances, but he certainly can not be said to have had *due* process of law.

In Chicago, Burlington, Etc., Ry. Co. v. Chicago, 166 U. S. 226, 234, this Court, on a writ of error to the Supreme Court of Illinois, in holding that the plaintiff in error had been deprived of its property without due process of law by a verdict of the jury and a judgment entered in pursuance thereof, in which the plaintiff in error was awarded the sum of \$1.00 in proceedings for the condemnation of certain of its property, when the evidence established that the value of said property was in excess of that awarded by the jury, says:

> "Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this Court has

said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the Court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law (United States v. Cruikshank, 92 U. S. 542, 554; Leeper v. Texas, 139 U. S. 462, 468). But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the *letter of the statute* prescribing forms of procedure in the courts and give the parties interested the *fullest opportunity* to be heard, and yet it might be that its *final action* would be *inconsistent with that amendment.* In determining what is due process of law regard must be had to *substance*, not to *form*. This Court, referring to the Fourteenth Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the *prohibition* to the states is of no *avail*, or has no application where the invasion of private rights is affected under the *forms* of state legislation.' (Davidson v. New Orleans, 96 U. S. 97, 102). *The same question could be propounded, and the answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law.*"

If it were established that there was in excess of $1,000,000.00 in the Safety Fund of the Men's Division of the Safety Fund Department at the time this assessment was levied, yet that fact would not and could not affect the validity of this assessment. This Safety Fund is held and administered by the Security Company, of Hartford, Connecticut, as Trustee, under a trust agreement which was ratified and confirmed by the insured and made a part of the policy or contract of insurance sued on (Rec., p. 106). Under the terms of this trust agreement the Security Company is required to pay over to petitioner to be used by petitioner in reduction of dues and assessments of the members, both the income and all further contributions to the Safety Fund after that Fund shall have reached $1,000,000.00 par value of the securities in which it is invested. If, therefore, as held by the Missouri Supreme Court (contrary to the record evidence), there was in excess of $1,000,000.00 in the Men's Division of the Safety Fund at the time this assessment was levied, the fault was that of the Trustee of that Fund, and not the Hartford Life Insurance Company, and manifestly the Hartford Life Insurance Company can neither be charged with the dereliction of someone else in the administration of a fund over which it had no control whatever, nor can an assessment levied by the Hartford Life Insurance Company be said to be invalid because of the dereliction of such Trustee in failing to pay over to the Hartford Life Insurance Company the excess of $1,000,000.00 to be used in reduction or diminution of this assessment.

We submit that the judgment of the Supreme Court of Missouri is not sustainable on the non-

federal grounds advanced by that Court in its opinion rendered in this case.

IV.

The holding of the Supreme Court of Missouri that petitioner did not plead an abandonment of the contract of insurance by the insured, and the refusal of that Court to consider the plea of abandonment by petitioner in its answer, deprives petitioner of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

In the answer of petitioner in the trial court it was alleged as follows (Rec., p. 7):

> "Defendant further alleges that the said James T. Johnson failed and neglected to pay the said mortality call either on or before June 1, 1902, the date when the same was due and payable, or on or before June 20, 1902, or on or before July 5, 1902, the dates to which the payment thereof had been successively extended, or at any other time, and that by the terms and provisions of said policy and application, the failure of said James T. Johnson to pay said mortality call or assessment *ipso facto* terminated said certificate or policy.
>
> "Defendant alleges that although the said James T. Johnson lived until the 15th day of January, 1907, or for nearly five years after the forfeiture, by reason of the non-payment of said assessment in July, 1902, he at no time considered said certificate in force, but at all times

acquiesced in the forfeiture thereof, resulting from the non-payment of said mortality call or assessment."

The case was tried on the theory that abandonment was properly pleaded and was also so considered by the Kansas City Court of Appeals and this question was the basis of a dissenting opinion in that court (Rec., p. 306).

With respect to the foregoing averment in the defendant's answer the Missouri Supreme Court says:

> "It will appear at a mere glance that this does not plead an abandonment. Abandonment presupposes an existing valid right which is to be abandoned. Acquiescence in a forfeiture (a cancellation of a right) is quite a different thing from abandoning an existing right. In the former the loss of the right, if any, occurs by reason of the forfeiture, while in the latter the loss of the right occurs by voluntarily and intentionally surrendering an existing right. An abandonment might give cause for forfeiture, but a forfeiture can supply no basis for an abandonment because when once forfeited the right does not remain to be abandoned."

In the cases of Mutual Life Ins. Co. v. Phinney, 178 U. S. 327; Mutual Life Ins. Co. v. Sears, 178 U. S. 345; Mutual Life Ins. Co. v. Hill, 193 U. S. 551; Mutual Life Ins. Co. v. Hill, 178 U. S. 347; Mutual Life Ins. Co. v. Allen, 178 U. S. 351; Levin v. Ins. Co. 112 Mo. App. 1; Clardon v. Sup. Lodge, 50 Mo. App. 45,

as well as in other cases where the question has been considered, it is held that there can be no recovery under a certificate or policy of insurance where the insured failed or refused to pay a certain premium or assessment and lived for an appreciable length of time thereafter without having paid or tendered said premium to the company. Under such circumstances the insured will be considered as having abandoned his contract or policy of insurance.

In the Hill case (193 U. S. 551) the insured took out a policy of insurance and paid the first premium. Notice of the second premium was given the insured, which he failed to pay. The insured died four years later without having paid or tendered the second or any subsequent premiums. This Court, in holding that there could be no recovery on the policy, says:

> "Courts have always set their faces against the insurance company which, having received its premiums, has sought by technical defenses to avoid payment, and in like manner should set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left unpaid.
>
> "We are satisfied that the thought never occurred to Rex during his lifetime that he had a claim against this company on the policy which had been issued so many years before, or if he did *after the lapse* of an *appreciable* time it was a dishonest thought when he knew that he had not performed the duties which devolved upon him under the contract, and that he had no rights thereunder, and there seems to be no just reason why his administrator should demand rights which he has virtually waived."

In the case at bar the undisputed and uncontradicted evidence shows that the insured lived for *five years* after the non-payment of the assessment due June 1, 1902, during which time he never paid or offered to pay the assessment in question.

In Missouri, as in every other state which has adopted the code practice, the purpose of an answer is to inform the opposite party of the defenses to the claim asserted, and we submit that the foregoing averments of the answer do advise the plaintiff that the defendant intended to resist the plaintiff's claim under the policy because the insured, during the five years prior to his death, did not tender or pay the assessments due and payable during that period.

If the *fact*, established at the trial, that the insured failed during the five years preceding his death to pay or tender to the defendant the assessment due five years prior thereto precludes a recovery by the beneficiary under the policy, the defendant most certainly made that averment in the answer as a *fact*, and as the code practice requires only the averment of *facts* and not conclusions it would seem to be immaterial so far as the averments of the answer are concerned whether or not such *facts* constitute an abandonment, a renunciation, a relinquishment, an abdication, an acquiescence in a forfeiture, or what not.

The essential elements of due process of law are a notice and a hearing. To hale one into court for a *hearing* and then to refuse to hear him when he requests to be heard, and as a consequence take from him his property, may be *some* process of law, but we respectfully submit that it is not *due* process of law.

Of what use to hale a defendant into court and then refuse to hear him after he comes into court?

As was said by Mr. Justice Field, in Windsor v. McVeigh, 93 U. S. 274, in delivering the opinion of the Court:

> "It would be like saying to a party, 'Appear and you shall be heard,' and when he has appeared, saying, 'Your appearance shall not be recognized and you shall not be heard.' In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with *moderation;* it was in fact a mere *arbitrary edict, clothed in the form of a judicial sentence.*"

In the instant case the defendant is haled into court to show justification, if any it has, why the policy in suit should not be paid. The defendant comes into court and alleges in its answer and establishes by the uncontradicted and undisputed evidence that the insured not only failed to pay an assessment under the policy when due, but for five years thereafter never paid or tendered to the defendant such assessment. This, under all the authorities, constitutes a valid defense. Neither the trial court nor counsel objected to testimony in support of this plea.

But, says the Supreme Court of Missouri (contrary to the plain averments of the answer), we refuse to recognize or give effect to this defense because it was not raised in the answer, when, as a matter of fact, it was raised in the answer.

To hold that a defense is not raised in answer when the answer itself shows that it was raised, is not *due*, but *undue*, process of law, and a judgment rendered under such circumstances, we submit, deprives the defendant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

In Hovey v. Elliot, 167 U. S. 409, 417, the trial court, after having adjudged the defendant to be in contempt of court, struck his answer from the files and entered a decree *pro confesso* against him and in favor of the plaintiff. Mr. Justice (now Chief Justice) White, in delivering the opinion of the Court and in holding that the judgment of the trial court under such circumstances deprived the defendant of his property without due process of law, says:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the Government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under the express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the Government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists,

then, in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess *the right to inflict the very wrongs which they were created to prevent.* * * *

"If the Court had power to do this, by *denying the right to be heard to the defendant,* what *plainer* illustration could there be of taking property of one and giving it to another without hearing or process of law?"

If a judgment is without due process of law because the Court struck defendant's answer from the files and refused to give him an opportunity to defend, then also must a judgment be without due process of law where the Court refuses to give effect to a defense properly made and raised in the answer upon the arbitrary and unjustifiable ground that no such defense was raised or pleaded.

We submit that the judgment rendered by the Supreme Court of Missouri against your petitioner under these circumstances is a "mere arbitrary edict clothed in the form of a judicial sentence" and should be reversed.

Respectfully submitted,

JAMES C. JONES,
GEO. F. HAID,
JAMES C. JONES, JR.,
Attorneys for Petitioner.

HARTFORD LIFE INSURANCE COMPANY *v.* JOHNSON.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 291. Submitted March 26, 1919.—Decided April 14, 1919.

Under Jud. Code, § 237, as amended by the Act of September 6, 1916, this court cannot consider a claim of federal right which was not made in the state court at the proper time and in the proper manner under the state system of pleading and practice and which, without evasion or for the purpose of defeating the claim, was denied consideration on that ground. P. 493.

The Supreme Court of Missouri, following its established practice, refused to consider a sister state judgment which was rendered six months after the judgment of the Missouri trial court, and was not set up in any pleading or introduced in evidence, but was brought to the notice of the appellate courts only in argument and as an exhibit to a brief. *Held*, that full faith and credit was not denied. *Id.*

Whether a charter granted to an insurance company by a resolution of a state legislature is a public act or record within the meaning of the "full faith and credit clause"—not decided. P. 494.

The exercise of their independent judgment by the courts of one State in construing a charter granted by the legislature of another can raise no federal question, if no statute or decision of the other State, construing the charter, was pleaded or put in evidence. *Id.*

Writ of certiorari to review 271 Missouri, 562, dismissed.

THE case is stated in the opinion.

Mr. James C. Jones, *Mr. Geo. F. Haid* and *Mr. James C. Jones, Jr.*, for petitioner, in support of the contention that the Connecticut judgment was before the court below, relied on *Jenkins* v. *International Bank*, 127 U. S. 484, 488, insisting that the only difference between that case and this was that in that one the judgment in the second action was brought forward while the trial court

still retained jurisdiction of the original action, whereas in the case at bar the decree was brought forward for the first time in the Kansas City Court of Appeals because the trial court had, by the appeal to that court, lost all jurisdiction of the action. This decree being entitled, under the Constitution, to full faith and credit, it would seem, on principle, that it should be accorded the same full faith and credit in the Kansas City Court of Appeals and in the Supreme Court of Missouri, even though the cause was then pending on appeal, as it would have been entitled in the trial court had it been rendered and introduced in evidence at the time the trial was had.

Mr. Matthew A. Fyke for respondent. *Mr. Peyton A. Parks* was on the brief.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a suit, on a life insurance policy or certificate, in which judgment was rendered against the company, petitioner, successively, by three courts of the State of Missouri. The case is in this court on writ of certiorari granted on the asserted ground that the State Supreme Court failed and refused to give full faith and credit to the judgment and decree of a superior court of the State of Connecticut, and also to the petitioner's charter, "a public record and act of the State of Connecticut," in violation of the rights secured to it by Article IV, § 1, of the Constitution of the United States.

Respondent moves to dismiss the writ for want of jurisdiction.

The decree of the superior court of Connecticut, to which it is claimed full faith and credit was denied, was rendered in the case of *Charles H. Dresser et al.* v. *The Hartford Life Insurance Company,* of Hartford, Connecticut,—the petitioner. The character of this decree and

the effect which must be given to it when properly pleaded and introduced in evidence in courts of other States are both sufficiently stated in *Hartford Life Insurance Co.* v. *Ibs*, 237 U. S. 662, and in *Hartford Life Insurance Co.* v. *Barber*, 245 U. S. 146.

The respondent, on this motion to dismiss, does not seek to have the decisions in the cases cited modified, but asserts that the claim of right now made was not so "set up or claimed" in the state courts that full faith and credit could be or was denied to the Dresser decree.

The judgment in this case in the trial court was rendered against the petitioner in September, 1909, and the decree in the *Dresser Case* was not rendered until six months later, in March, 1910. The latter decree was not set up in any pleading and was not introduced in evidence in this case. The only way in which it came to the notice of the Missouri courts was in argument and as an exhibit to a brief filed in the appellate courts and the Supreme Court of Missouri dealt with it in this single paragraph:

"The case at bar was tried below on May 12, 1909, which was prior in time to the entering of the decree in the *Dresser Case*, and the record in the *Dresser Case* was therefore not offered or presented in the trial of this case. Since the record of the *Dresser Case* is in no manner properly raised or lodged in this case, we do not deem it to be within the scope of our review and likewise the Federal question based thereon. Under such circumstances the rule announced by the Supreme Court of the United States in *Hartford Life Insurance Co.* v. *Ibs, supra* [237 U. S. 662], should not be applied to this case."

The jurisdiction of this court to review the final judgment or decree of the highest court of a State, in such a case as we have here, is defined in § 237 of the Judicial Code, as amended September 6, 1916, c. 448, 39 Stat. 726, which provides that it shall be competent for this court, by certiorari to require any such cause to be certified to

it for review when there is claimed in it any title, right, privilege or immunity under the Constitution of the United States and "the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution." It is the settled law that this provision means "that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, . . . and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right." *Atlantic Coast Line R. R. Co.* v. *Mims*, 242 U. S. 532, 535; *Gasquet* v. *Lapeyre*, 242 U. S. 367, 371, and cases cited.

No suggestion is, or could be made, that the Missouri State Supreme Court's holding in this case was framed to evade the consideration of the federal right now asserted, for it had long been the established law of that State that under its system of practice the construction of either the federal or state constitution would not be treated as involved in a case, in a jurisdictional sense, unless it appeared that such question was raised and ruled on in the trial court, and also that constitutional questions could not be injected into a case for the first time in an appellate court by argument or brief of counsel for the purpose of giving jurisdiction. *Miller* v. *Connor*, 250 Missouri, 677, 684. It has further been uniformly held by that court since 1836 that it will not take judicial notice of the laws of other States, but that they must be proved, as other facts, by evidence introduced at the trial. *Southern Illinois & Missouri Bridge Co.* v. *Stone*, 174 Missouri, 1, 33.

On the authorities thus cited we are obliged to conclude

that the question as to the faith and credit which should be given to the Dresser decree was not so presented to or ruled upon by the Supreme Court of Missouri as to present a federal question for review by this court.

But, as if anticipating the result we have just reached, the petitioner contends that full faith and credit were denied to its charter, "a public record and act of the State of Connecticut," which was introduced in evidence, for the reason that the Supreme Court of Missouri, interpreting that charter, erroneously approved the charge to the jury by the trial court "that it devolved upon the defendant to prove that the assessment," the non-payment of which was relied upon as forfeiting the policy sued upon, was made by the directors of the defendant. The petitioner introduced evidence tending to prove that the assessment under discussion was made, not by formal action of the board of directors, but by executive officers of the company, "the president and secretary . . . or the vice president and secretary, or possibly the vice president and assistant secretary," and it contended that this was sufficient in law because it had long been the practice of the company and was recognized by the directors as action taken in their behalf under authority delegated by them.

Even if this charter, which was granted by a resolution of the Assembly of Connecticut, be regarded as a public act or record of that State within the scope of the constitutional provision, Article IV, § 1 (which is not decided), nevertheless, since no statute of Connecticut or decision of any court of that State was pleaded or introduced in evidence in this case, giving a construction to the provision of the charter which the Missouri courts, treating as valid, interpreted, the exercise by those courts of an independent judgment in placing a construction upon it cannot present a federal question under the full faith and credit clause of the Constitution. *Louisville & Nashville*

R. R. Co. v. *Melton*, 218 U. S. 36, 50, and *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 273, 275.

It is asserted that the record presents other constitutional questions which give this court jurisdiction to review the case, but an examination shows the claims to be too unsubstantial to merit discussion and the writ must be

Dismissed.